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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CLAIRE DELACRUZ,	)	
INDIVIDUALLY, AND ON BEHALF	)	
OF HERSELF AND ALL OTHERS	)	
SIMILARLY SITUATED,	)	
	)	
PLAINTIFF,	)	NO. C-11-3532 CW
	)	
VS.	)	THURSDAY, MAY 15, 2014
	)	
CYTOSPORT, INC.,	)	OAKLAND, CALIFORNIA
	)	
DEFENDANT.	)	MOTION FOR SETTLEMENT
	)	FAIRNESS HEARING

**BEFORE THE HONORABLE CLAUDIA WILKEN, JUDGE**

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

**FOR PLAINTIFF:** BARON & BUDD, P.C.  
15910 VENUTRA BOULEVARD, SUITE 1600  
ENCINO, CALIFORNIA 91436  
BY: MARK PIFKO, ESQUIRE  
DANIEL ALBERSTONE, ESQUIRE

**FOR DEFENDANT:** GIBSON, DUNN & CRUTCHER  
555 MISSION STREET, SUITE 3000  
SAN FRANCISCO, CALIFORNIA 94105  
BY: G. CHARLES NIERLICH, ESQUIRE, ESQUIRE  
MATTHEW L. BERDE, ESQUIRE, ESQUIRE

**ALSO PRESENT:** WILLIAM I. CHAMBERLAIN, OBJECTOR

**REPORTED BY:** DIANE E. SKILLMAN, CSR 4909, RPR, FCRR  
OFFICIAL COURT REPORTER

TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

1 THURSDAY, MAY 15, 2014

2:13 P.M.

2 P R O C E E D I N G S

3 **THE CLERK:** WE ARE CALLING C-11-3532 DELACRUZ VERSUS  
4 CYTOSPORT, INC.

5 PLEASE STEP FORWARD AND STATE YOUR APPEARANCES FOR THE  
6 RECORD, PLEASE.

7 **MR. PIFKO:** GOOD AFTERNOON, YOUR HONOR. MARK PIFKO  
8 FROM BARON & BUDD ON BEHALF OF PLAINTIFFS.

9 **THE COURT:** WOULD STAND OVER BY THE JURY BOX, PLEASE.

10 **MR. ALBERSTONE:** GOOD MORNING, YOUR HONOR -- GOOD  
11 AFTERNOON. DAN ALBERSTONE OF BARON & BUDD ALSO FOR THE  
12 PLAINTIFFS.

13 **MR. NIERLICH:** GOOD AFTERNOON, YOUR HONOR. CHARLES  
14 NIERLICH WITH MY COLLEAGUE MATT BERDE FOR THE DEFENDANT  
15 CYTOSPORT.

16 **MR. CHAMBERLAIN:** GOOD MORNING (SIC), YOUR HONOR.  
17 WILL CHAMBERLAIN. I'M A PRO SE OBJECTOR.

18 **THE COURT:** OKAY. AND ARE THESE ALL THE PEOPLE WHO  
19 ARE HERE ON THIS CASE? WE DON'T HAVE ANY OTHER OBJECTORS  
20 PRESENT?

21 **MR. NIERLICH:** TO OUR KNOWLEDGE, YES.

22 **THE COURT:** ANYBODY ELSE HERE WANT TO OBJECT TO THE  
23 SETTLEMENT?

24 (NO RESPONSE.)

25 **THE COURT:** OKAY. SO I DO HAVE A COUPLE OF QUESTIONS

1 AND THEN I WILL HEAR BRIEFLY FROM EACH SIDE, THEN I'LL HEAR  
2 FROM THE OBJECTOR IF HE FEELS THAT HIS ISSUES HAVEN'T BEEN  
3 ADDRESSED, AND THEN WE'LL TAKE IT FROM THERE.

4 I HAVE A QUESTION ABOUT THE DIFFERENCE BETWEEN A COST  
5 NUMBER THAT YOU HAD BEFORE AND THE COST NUMBER THAT YOU HAVE  
6 NOW, AND I'M WONDERING WHY THAT HAS CHANGED. AND LET ME SEE  
7 IF I CAN FIND THE NUMBERS.

8 **MR. PIFKO:** YOUR HONOR, MAYBE I CAN PREEMPTIVELY  
9 EXPLAIN THE ANSWER TO YOUR QUESTION.

10 I BELIEVE THAT BECAUSE WE WENT BACK AND CHANGED THE TERMS,  
11 WE RESTRUCTURED THE WAY ATTORNEYS' FEES AND COSTS WERE SET UP.  
12 ORIGINALLY THERE WAS SORT OF A NOT-TO-OBJECT COST NUMBER --

13 **THE COURT:** A SORT OF A WHAT?

14 **MR. PIFKO:** NOT-TO-OBJECT COST NUMBER.

15 **THE COURT:** I DON'T KNOW WHAT THAT MEANS.

16 **MR. PIFKO:** THEY SET A CAP ON THE COSTS REGARDLESS OF  
17 WHAT WAS ACTUALLY INCURRED. AND WHEN WE WENT BACK AND  
18 RENEGOTIATED IT, THEY JUST SAID WE COULD SUBMIT ALL OF OUR  
19 ACTUAL COSTS. SO THAT'S WHY THERE'S A DIFFERENT NUMBER.

20 **THE COURT:** SO BEFORE IT WAS EIGHTY-SEVEN FIVE.

21 **MR. PIFKO:** THAT WAS JUST A CAP, THOUGH. THAT WASN'T  
22 OUR ACTUAL COST. IT WAS A CAP THAT THEY HAD PUT ON IT. THE  
23 ONE NINETY -- I DON'T HAVE IT -- IS OUR --

24 **THE COURT:** THEN YOU HAD THE ONE NINETY EIGHT  
25 THIRTY-NINE FORTY-ONE.

1           **MR. PIFKO:**   RIGHT.

2           **THE COURT:**   \$190,839.41.

3           **MR. PIFKO:**   THAT'S OUR ACTUAL COST THAT WE INCURRED.

4           **THE COURT:**   CURRENT ACTUAL COSTS.

5           **MR. PIFKO:**   RIGHT.

6           **THE COURT:**   AND THE EIGHTY-SEVEN FIVE WASN'T RELATED  
7 TO YOUR COSTS AT ALL, IT WAS SIMPLY A CAP ON COSTS, AND YOU  
8 MIGHT HAVE HAD LESS OR MORE COSTS THAN THAT AT THAT TIME?

9           **MR. PIFKO:**   RIGHT.   THAT WAS THE WAY THE SETTLEMENT  
10 WAS STRUCTURED THAT THEY PUT A CAP IT.

11           **THE COURT:**   DO YOU AGREE WITH THAT?   IS THAT WHAT  
12 HAPPENED?

13           **MR. NIERLICH:**   YOUR HONOR, I BELIEVE, AND I'LL TAKE A  
14 LOOK AT THIS RIGHT NOW --

15           **THE COURT:**   I'M JUST CONCERNED WHETHER YOU WERE  
16 INSTEAD RECHARACTERIZING SOMETHING THAT YOU USED TO CALL  
17 SOMETHING ELSE AND NOW RECHARACTERIZED IT AS COST.   THAT WAS  
18 MY CONCERN.

19           **MR. PIFKO:**   IT WAS JUST -- IT'S SIMPLY THAT.

20           **THE COURT:**   THAT'S NOT WHAT HAPPENED?

21           **MR. PIFKO:**   THE COST DIDN'T CHANGE.   WE DIDN'T  
22 RECHARACTERIZE ANYTHING.   WE JUST SET IT UP SO THAT THERE WAS  
23 NO CAP, AND UNDER THE PREVIOUS AGREEMENT THERE WAS.

24           **MR. NIERLICH:**   YOUR HONOR, IF I MAY, JUST TO CLARIFY.  
25 THERE WAS AN ORIGINAL SETTLEMENT AGREEMENT.   AND THEN YOU

1 MAY RECALL, AFTER THE PRELIMINARY HEARING, WE HAD AN AMENDED  
2 SETTLEMENT AGREEMENT.

3 **THE COURT:** RIGHT.

4 **MR. NIERLICH:** THE ORIGINAL SETTLEMENT AGREEMENT HAD  
5 THE \$87,500 CAP FOR COSTS AND A DIFFERENT ATTORNEYS' FEES  
6 FIGURE THAT WAS ACTUALLY HIGHER. AND IN THE RE-NEGOTIATED  
7 AGREEMENT, THE PLAINTIFFS AGREED TO A LOWER NUMBER, WHICH IS  
8 THE -- ULTIMATELY BE ONE ONE EIGHT SEVEN FIVE HUNDRED, BUT IT  
9 WAS ATTORNEYS' FEES AND COSTS TOGETHER.

10 AND THAT'S IN THE AMENDED AGREEMENT, DOCKET 67-1,  
11 PARAGRAPH 38.

12 **THE COURT:** THIS IS SOUNDING DIFFERENT TO ME. WHAT  
13 DID YOU JUST SAY? NOW THERE'S A NUMBER FOR ATTORNEYS' FEES  
14 AND COSTS TOGETHER?

15 **MR. NIERLICH:** NO. WHAT I'M SAYING IS, IN THE  
16 AMENDED SETTLEMENT AGREEMENT, THE OPERATIVE SETTLEMENT  
17 AGREEMENT, THE ONE THAT WAS SUBJECT TO THE NOTICE AND WAS  
18 PRELIMINARILY APPROVED BY THE COURT, THE AGREEMENT IS NOT TO  
19 OBJECT UP TO A CLAIM FOR \$1,187,500 IN ATTORNEYS' FEES AND  
20 COSTS. SO ATTORNEYS' FEES AND COSTS WERE TREATED TOGETHER,  
21 WHEREAS IN THE ORIGINAL SETTLEMENT, THERE WAS A FIGURE FOR  
22 ATTORNEYS' FEES AND A SEPARATE FIGURE FOR COSTS. DOES THAT  
23 HELP?

24 **THE COURT:** YES, BUT SO NOW THE FIGURE THAT'S BEING  
25 SOUGHT FOR ATTORNEYS' FEES IS HOW MUCH?

1           **MR. PIFKO:** THE ACTUAL NUMBER FOR FEES WHEN YOU  
2           SUBTRACT COSTS IS NINE NINE SIX SIX SIX ZERO AND FIFTY-NINE  
3           CENTS.

4           **THE COURT:** OKAY. AND THE COST NUMBER IS THE --

5           **MR. PIFKO:** ONE NINETY EIGHT THREE NINE AND FORTY-ONE  
6           CENTS.

7           **THE COURT:** AND THOSE TWO NUMBERS ADDED UP TOGETHER  
8           EQUALS?

9           **MR. PIFKO:** ONE EIGHTY-SEVEN -- ONE ONE EIGHT SEVEN  
10          FIVE HUNDRED.

11          **THE COURT:** SO TO THE EXTENT THE FIRST SETTLEMENT  
12          AGREEMENT ALLUDED TO EIGHTY-SEVEN FIVE IN COSTS, DO YOU AGREE  
13          WITH WHAT HE SAID THAT THAT WASN'T RELATED TO THEIR ACTUAL  
14          COSTS THAT THEY WERE CLAIMING, BUT WAS RATHER A CAP ON COSTS  
15          SEPARATELY?

16          **MR. NIERLICH:** THAT WAS A CAP ON COSTS THAT WE  
17          UNDERSTOOD TO BE LESS THAN THE TOTAL AMOUNT OF COSTS THAT THEY  
18          WERE CLAIMING AT THAT TIME, BUT WE DID NOT SEPARATELY  
19          INVESTIGATE THE TOTAL AMOUNT OF COSTS THEY WERE CLAIMING AT  
20          THAT TIME.

21          **THE COURT:** OKAY. SO YOU HAVE -- DO YOU HAVE ANY  
22          REASON TO BELIEVE THAT WHAT'S HAPPENED IS THAT THEY'RE  
23          RECHARACTERIZING AS COSTS SOMETHING THAT HAD PREVIOUSLY BEEN  
24          CHARACTERIZED AS SOMETHING ELSE?

25          **MR. NIERLICH:** I HAVE NO REASON TO BELIEVE THAT TO BE

1 THE CASE, YOUR HONOR. AGAIN, WE HAD AN ORIGINAL AGREEMENT  
2 THAT PROVIDED FOR ONE NUMBER FOR FEES AND ANOTHER FOR COSTS  
3 AND AN AMENDED AGREEMENT THAT HAD FEES PLUS COSTS TOGETHER.

4 **THE COURT:** OKAY.

5 **MR. PIFKO:** JUST SO YOU KNOW, TOO, THAT THE DELTA  
6 BETWEEN THE ORIGINAL AGREEMENT AND THE AMENDED AGREEMENT WAS  
7 ABOUT \$140,000 THAT WE TOOK OFF FROM FEES.

8 **THE COURT:** OKAY.

9 SO, YOU HAVE A NUMBER IN THE SETTLEMENT AGREEMENT OF  
10 1,807,500 IN PRODUCT DONATIONS AND SETTLEMENT ADMINISTRATION  
11 COSTS, I THINK.

12 AND MY QUESTION IS, WHAT'S THE BREAKDOWN THERE? HOW MUCH  
13 OF THAT IS, IN FACT, SETTLEMENT ADMINISTRATION AND HOW MUCH  
14 ARE YOU ATTRIBUTING TO THE COST OF PRODUCT DONATIONS?

15 **MR. PIFKO:** I HAVEN'T SEEN THE BILL FOR THE  
16 SETTLEMENT ADMINISTRATION YET. AND I UNDERSTAND THAT A FINAL  
17 BILL HASN'T BEEN MADE BECAUSE WHEN THEY ACTUALLY MAIL OUT THE  
18 CHECKS AND PRINT THE CHECKS AND EVERYTHING, THERE'S GOING TO  
19 BE SUBSTANTIAL COSTS IN CONNECTION WITH THAT.

20 I -- MY INFORMATION IS REALLY WHAT I KNOW FROM THEM, SO I  
21 THINK MR. NIERLICH CAN SPEAK TO THAT.

22 **MR. NIERLICH:** YOUR HONOR, I WILL BE HAPPY TO ADDRESS  
23 THAT. THE SETTLEMENT COSTS INCURRED TO DATE ARE APPROXIMATELY  
24 \$220,000.

25 **THE COURT:** SETTLEMENT ADMINISTRATION COSTS?

1           **MR. NIERLICH:** SETTLEMENT ADMINISTRATION AND NOTICE  
2 COSTS, CORRECT. AND THEN ON TOP OF THAT, WE WOULD ANTICIPATE  
3 THERE BEING A SUBSTANTIAL ADDITIONAL PORTION ASSOCIATED WITH  
4 SENDING OUT THE CHECKS TO THE 30,000 PLUS CLAIMANTS AND ALSO  
5 JUST BE OTHER ISSUES THAT GO INTO ADMINISTERING A SETTLEMENT  
6 OF THAT SIZE.

7           SO MY BEST GUESS ESTIMATE WOULD BE A LITTLE BIT NORTH OF  
8 \$300,000.

9           **THE COURT:** MORE OR ALTOGETHER?

10          **MR. NIERLICH:** TOTAL. THAT WOULD BE AN ESTIMATE,  
11 YES.

12          **THE COURT:** WHICH LEAVES US ABOUT A MILLION AND A  
13 HALF FOR PRODUCT DISTRIBUTION.

14          **MR. NIERLICH:** ASSUMING THAT ESTIMATE IS CORRECT,  
15 YES.

16          **THE COURT:** AND DESCRIBE TO ME HOW THE PRODUCT  
17 DISTRIBUTION WILL WORK.

18          **MR. NIERLICH:** SURE.

19          THE PRODUCT DISTRIBUTION, THERE'S A PLAN THAT WE INCLUDED  
20 WITH CYTOSPORT RESPONSE TO THE FINAL APPROVAL MOTION WOULD BE  
21 CONSISTENT WITH THE REQUIREMENTS OF THE SETTLEMENT AGREEMENT;  
22 NAMELY, THAT A PRODUCT WOULD BE DISTRIBUTED, AND IT WOULD  
23 BE -- FIRST OF ALL, THE PRODUCT TO BE DISTRIBUTED WOULD BE NOT  
24 THE PRODUCT THAT WAS ORIGINALLY AT ISSUE HERE, MUSCLE MILK,  
25 BUT MUSCLE MILK LIGHT --



1           **THE COURT:**   RIGHT.

2           **MR. NIERLICH:**   -- OR A COMPARABLE PRODUCT LIKE THAT  
3           WITH A LOWER AMOUNT OF FAT AND FEWER CALORIES THAN THE  
4           ORIGINAL MUSCLE MILK --

5           **THE COURT:**   RIGHT.   I AM MORE PICTURING WHAT, YOU SET  
6           UP A TABLE AT A RACE AND HAND OUT BARS TO PEOPLE?

7           **MR. NIERLICH:**   IT DEPENDS ON THE RACE.   IT DEPENDS ON  
8           THE EVENT.   SO THE EVENTS TARGETED ARE CHARITABLE ATHLETIC  
9           EVENTS WITH A HEALTH-RELATED TOPIC.   SO, FOR EXAMPLE, THE  
10          SUSAN B. KOMEN RACE FOR THE CURE, OR SOMETHING LIKE THAT.

11          OBVIOUSLY DEPENDS WHAT EVENTS ARE BEING OFFERED IN THE  
12          TIME FRAME IN WHICH THIS TAKES PLACE WHICH, OF COURSE, WE  
13          DON'T KNOW UNTIL WE SEE WHETHER THERE MIGHT BE AN APPEAL OF  
14          ANY DECISION, AND SO ON, BUT THOSE -- IT DEPENDS ON THE RACE  
15          RULES EXACTLY HOW THAT WOULD HAPPEN.

16          SO IT COULD BE DISTRIBUTED FROM A TABLE, IT COULD BE  
17          PROVIDED TO PARTICIPANTS IN SOME OTHER WAY.   IT JUST DEPENDS  
18          ON THE EVENT --

19          **THE COURT:**   YOU'RE TALKING ABOUT A LOT OF BARS.   SO  
20          THIS IS GOING TO BE SORT OF A MAJOR THING.   YOU'RE GOING TO  
21          HAVE TO FIND RACES IN VARIOUS PLACES AND APPLY TO BE ONE OF  
22          THE TABLES THAT GOES THERE, AND SEND THE BARS AND SEND THE  
23          PEOPLE.   THIS ISN'T JUST GOING TO HAPPEN.

24          **MR. NIERLICH:**   THAT'S CORRECT, YOUR HONOR.   IT IS A  
25          MAJOR UNDERTAKING.   IT WILL TAKE PLACE OVER A COURSE OF THREE

1 YEARS.

2 THERE WOULD BE, AS WE INDICATED IN THE PRODUCT  
3 DISTRIBUTION PLAN SUBMITTED TO THE COURT, WE'D BE REPORTING TO  
4 THE COURT WHAT IS INTENDED TO BE DONE AND THEN AFTERWARDS  
5 WHAT, IN FACT, HAS BEEN DONE, AND IT WOULD BE, YOU KNOW,  
6 FAIRLY BROAD EFFORT WITH QUITE A FEW PRODUCT.

7 IF YOU ASSUME FOR THE MOMENT ONE AND A HALF MILLION  
8 DOLLARS AND IF YOU ASSUME A RETAIL VALUE OF, YOU KNOW, FOUR TO  
9 \$5 PER CONTAINER OF PRODUCT, YOU'RE TALKING ABOUT MORE THAN  
10 300,000 UNITS. THIS IS NOT A SMALL EFFORT.

11 **THE COURT:** RIGHT. THAT'S MY POINT. SO THIS WOULD  
12 BE NATIONWIDE OR WHERE WOULD THESE EVENTS BE TAKING PLACE?

13 **MR. NIERLICH:** IT WOULD BE -- DEPENDS ON WHERE THE  
14 EVENTS ARE OFFERED. CERTAINLY WOULD NOT BE INTENDED TO BE --

15 **THE COURT:** EVENTS ARE OFFERED EVERYWHERE.

16 **MR. NIERLICH:** RIGHT. AND WITH WHOM WE WOULD BE ABLE  
17 TO MAKE SURE WE MADE THE PROPER ARRANGEMENTS TO DO THIS AS  
18 EFFECTIVELY AS POSSIBLE.

19 BUT THAT WOULD BE -- I HATE TO SAY "NATIONWIDE" BECAUSE I  
20 DON'T WANT TO IMPLY NECESSARILY EACH OF THE 50 STATES, BUT IT  
21 WOULDN'T BE JUST IN CALIFORNIA.

22 **THE COURT:** THIS IS A NATIONWIDE CLASS, IS IT NOT?

23 **MR. NIERLICH:** YES.

24 **THE COURT:** OKAY. SO YOU WOULD BE MAKING AN EFFORT,  
25 AT LEAST, TO BE BROADLY GEOGRAPHICALLY DIVERSE?

1           **MR. NIERLICH:** ABSOLUTELY.

2           **THE COURT:** AND THIS WOULD GO TO PEOPLE WHO WERE LIKE  
3 RUNNING IN A RACE FOR CHARITY TYPE THING?

4           **MR. NIERLICH:** THAT'S CORRECT.

5           **THE COURT:** THE ACTUAL RUNNERS. AND THEY'D GET IT  
6 WHEN THEY FINISHED, OR WHEN THEY STARTED, OR SOMETIME OR  
7 OTHER?

8           **MR. NIERLICH:** IT WOULD DEPEND ON THE EVENT RULES.  
9 IT MIGHT BE PROVIDED ONLY TO PARTICIPANTS. IT MIGHT ALSO BE  
10 PROVIDED TO PEOPLE WHO SIMPLY COME TO WATCH. AGAIN, DEPENDS  
11 ON WHAT THAT RACE ALLOWS YOU TO DO AND HOW IT'S STRUCTURED,  
12 WHICH IS REALLY A RACE-BY-RACE ISSUE -- OR EVENT BY EVENT, I  
13 SHOULD SAY.

14           **THE COURT:** SO YOU'LL HAVE SOMEBODY ON YOUR STAFF WHO  
15 LOOKS AROUND AND FINDS APPROPRIATE EVENTS AND CONTACTS  
16 ORGANIZERS AND OFFERS YOUR PRODUCT AND KEEPS TRACK OF HOW MUCH  
17 IS GIVEN, AND SETS UP THE TABLE AND HIRES THE PERSON TO GO TO  
18 THE TABLE; YOU ARE GOING TO DO ALL THAT?

19           **MR. NIERLICH:** CORRECT INSOFAR AS DETERMINING THE  
20 EVENT. WHETHER OR NOT THERE'S A PHYSICAL TABLE WOULD, AGAIN,  
21 DEPEND ON THE EVENT RULES. THE EVENT ORGANIZERS, IN SOME  
22 CASES, WOULD ALLOW YOU TO HAVE A TABLE AND DISTRIBUTE  
23 DIRECTLY, AND OTHER CASES MIGHT PREFER TO HAVE YOU DELIVER THE  
24 PRODUCT AND THEY WOULD DISTRIBUTE IT. IT JUST DEPENDS ON THE  
25 EVENT.

1           **THE COURT:** I SEE. BUT THE DOLLAR AMOUNT IS GOING TO  
2 BE THE RETAIL COST OF THE PRODUCT, NOT --

3           **MR. NIERLICH:** CORRECT.

4           **THE COURT:** -- NOT YOUR COST IN FINDING EVENTS, AND  
5 SHIPPING THINGS, AND SETTING UP TABLES, AND ALL THAT?

6           **MR. NIERLICH:** CORRECT. ACCORDING TO THE SETTLEMENT  
7 AGREEMENT, IT IS VALUED AS THE RETAIL VALUE OF THE PRODUCT  
8 DISTRIBUTED. THE BENEFIT THAT IS ACTUALLY TAKEN DIRECTLY BY  
9 THE MEMBERS OF THE CLASS. CORRECT.

10          **THE COURT:** SO THE OTHER ADMINISTRATIVE-TYPE EXPENSES  
11 OR ORGANIZING EXPENSES WILL BEING BORNE BY YOU, I TAKE IT?

12          **MR. NIERLICH:** THAT'S CORRECT, YOUR HONOR.

13          **THE COURT:** SO WHAT CAN YOU TELL ME, I'M SURE I'VE  
14 READ THIS A MILLION TIMES, BUT WHAT CAN YOU TELL ME ABOUT THE  
15 STATUS OF THE LAW WITH RESPECT TO DETERMINING ATTORNEYS' FEES  
16 BY WAY OF PERCENTAGE OF THE COMMON FUND VERSUS LODESTAR?

17          WE KNOW WE'RE SUPPOSED TO CROSS-CHECK. WE KNOW THAT OFTEN  
18 IT'S PERCENTAGE, CROSS-CHECK WITH LODESTAR, BUT WHAT IS THE  
19 STATE OF THE LAW WITH RESPECT TO, FOR EXAMPLE, AWARDING FEES  
20 BASED ON LODESTAR CROSS-CHECKED AGAINST PERCENTAGE PERHAPS?

21          I DON'T KNOW WHO WANTS TO ANSWER THAT.

22          **MR. PIFKO:** I'M NOT SURE I FULLY UNDERSTAND YOUR  
23 QUESTION --

24          **THE COURT:** THERE'S TWO POSSIBLE WAYS TO DETERMINE  
25 ATTORNEYS' FEES ONE COULD THEORETICALLY USE. ONE IS

1 PERCENTAGE OF A COMMON FUND AND ONE IS LODESTAR. AND CASES  
2 TALK ABOUT THAT. AND I THINK THEY GENERALLY SAY THAT THE  
3 LODESTAR IS PREFERRED, I'M THINKING, BUT THEY ALWAYS SAY THAT  
4 ONE SHOULD CHECK THE PERCENTAGE AGAINST THE LODESTAR.

5 BUT MY QUESTION IS, IS THERE ANY LAW THAT SAYS YOU CAN'T  
6 USE THE LODESTAR INSTEAD? DO YOU HAVE TO USE A PERCENTAGE OF  
7 COMMON FUND?

8 **MR. PIFKO:** NO, YOUR HONOR. I BELIEVE IT'S AT YOUR  
9 DISCRETION AS TO WHICH APPROACH YOU WOULD LIKE TO USE. AND AS  
10 I BELIEVE YOU WOULD KNOW IN OUR ATTORNEYS' FEE MOTION, WE  
11 PROVIDED AN ANALYSIS UNDER BOTH METHODS.

12 **THE COURT:** RIGHT. WHAT'S YOUR OPINION?

13 **MR. NIERLICH:** YOUR HONOR, WE DIDN'T OBJECT TO THE  
14 ATTORNEYS' FEES REQUEST. AND SO I DON'T --

15 **THE COURT:** I'M JUST ASKING YOU ABOUT THE LAW, WITH  
16 RESPECT TO WHETHER IT'S LEGALLY CORRECT TO USE LODESTAR  
17 INSTEAD OF PERCENTAGE OF THE COMMON FUND JUST AS A  
18 HYPOTHETICAL QUESTION.

19 **MR. NIERLICH:** SURE, YOUR HONOR.

20 ADDRESSING IT IN THAT FRAMEWORK, I'M AWARE OF THE CASE LAW  
21 THAT LOOKS AT BOTH OF THOSE ISSUES INDEPENDENTLY. I BELIEVE  
22 IT CAN BE DONE EITHER WAY, AS MR. PIFKO SAYS, AT THE COURT'S  
23 DISCRETION.

24 **THE COURT:** OKAY. CAN YOU THINK OF ANY WAY THAT ONE  
25 COULD VALUE THE INJUNCTION APART FROM YOUR AGREEMENT? IS THAT

1 THE SORT OF THING SOME EXPERT COULD OPINE UPON? IS THERE SOME  
2 ANALYTICAL METHOD BY WHICH ONE COULD CALCULATE SUCH A THING?

3 **MR. PIFKO:** WELL, YOUR HONOR, YOU KNOW, WE SORT OF  
4 DOWNPLAY THE INJUNCTION A LITTLE BIT IN OUR PAPERS --

5 **THE COURT:** I KNOW --

6 **MR. PIFKO:** -- BECAUSE OF THE DIFFICULTY OF  
7 EVALUATING IT, BUT I WANTED YOU TO KNOW WE DO THINK IT'S A  
8 SUBSTANTIAL BENEFIT.

9 I'M SURE, MANY CASES YOU CAN IMAGINE, JUST ACHIEVING AN  
10 INJUNCTION IN A CASE IS A SIGNIFICANT ACCOMPLISHMENT, AND WE  
11 FEEL THAT IT'S AN IMPORTANT OUTCOME IN THIS CASE.

12 AS FAR AS YOUR SPECIFIC QUESTION, WE DID SUBMIT IN THE  
13 AMENDED SETTLEMENT PAPERS THAT AFTER -- WE HAD SUBMITTED TO  
14 YOU AFTER PRELIMINARY APPROVAL, WE DID SUBMIT A DECLARATION  
15 FROM A MARKETING EXPERT WHERE SHE -- YOU KNOW, IT'S REALLY  
16 HARD TO PUT A SPECIFIC PRECISE NUMBER ON IT, BUT SHE NOTED  
17 THAT -- SHE'S A U.C.L.A. MARKETING PROFESSOR. AND SHE NOTED  
18 THAT BASED ON SURVEYS THAT SHE HAD DONE WITH CLASS  
19 CERTIFICATION REPORT IN THIS CASE, THAT 35 TO 50 PERCENT OF  
20 THE CLASS MEMBERS WERE -- WOULD HAVE FOUND THE REPRESENTATIONS  
21 AT ISSUE MATERIAL, YOU KNOW, SIGNIFICANT TO THEIR PURCHASING  
22 DECISION, AND THAT CHANGING THEM, I.E., TAKING THEM OFF THE  
23 PRODUCT WOULD AFFECT THEIR DECISION-MAKING.

24 SHE OPINED THAT SOME OF THEM, YOU KNOW, IT'S HARD TO KNOW  
25 FOR SURE, BUT SOME OF THEM MIGHT NOT BUY THE PRODUCT. SOME OF

1       THEM, ABSENT THOSE PHRASES BEING ON THE LABELS, WOULD ACTUALLY  
2       READ THE INGREDIENT FACTS INSTEAD OF JUST RELYING ON THE  
3       FRONT-OF-THE-PACKAGE LABELING. SO THAT WOULD CHANGE CONSUMER  
4       BEHAVIOR.

5           IT'S HARD TO KNOW EXACTLY, LIKE I SAID, A DOLLAR AMOUNT.  
6       WE FEEL CONFIDENT THAT ONE MILLION WAS A WAY FAR CONSERVATIVE  
7       NUMBER GIVEN THE SALES IN THIS CASE. AND IF YOU CHANGE  
8       CONSUMER BEHAVIOR FOR EVEN A SMALL PERCENTAGE, WHICH HER  
9       RESEARCH SHOWS THAT IT WOULD BE MORE THAN A SMALL PERCENTAGE,  
10      YOU WOULD BE GETTING A SIGNIFICANT BENEFIT HERE.

11           **THE COURT:** WHAT IS THE PLAINTIFFS' DAMAGE THEORY?  
12      HAD THE CASE GONE TO TRIAL, WHAT WOULD THE PLAINTIFFS BE  
13      ASKING FOR AND WHY?

14           **MR. PIFKO:** WELL, WE WOULD HAVE BEEN -- BECAUSE IT  
15      WAS -- IN LIGHT OF THOSE FINDINGS THAT I DON'T HAVE THE EXACT  
16      PERCENTAGES, BUT LIKE I SAID AROUND 35 TO 50 PERCENT OF CLASS  
17      MEMBERS WOULD HAVE FOUND THESE PHRASES MATERIAL IN THEIR  
18      PURCHASING DECISIONS, AND OUR CLASS REP, INDEED, FOUND THEM TO  
19      BE MATERIAL. UNDER STERNS AND --

20           **THE COURT:** RIGHT. BUT WHAT WOULD YOU HAVE STOOD UP  
21      TO THE JURY AND SAID? GIVE EACH PLAINTIFF "X" DOLLARS OR GIVE  
22      THE CLASS "X" DOLLARS? WHAT WOULD YOU ACTUALLY HAVE BEEN  
23      ASKING FOR?

24           **MR. PIFKO:** WE WOULD HAVE SOUGHT INJUNCTIVE RELIEF IN  
25      THE FORM OF TAKING OFF THE OFFENDING PHRASES FROM THE

1        PACKAGING.  AND WE WOULD HAVE SOUGHT SOME SORT OF MONETARY  
2        RESTITUTION TO CONSUMERS IN THE FORM OF EITHER PAYMENT FOR  
3        PURCHASES THEY HAD MADE OR SOME SORT OF FREE PRODUCT IN  
4        EXCHANGE TO COMPENSATE THEM FOR THE EXPENSE OF BUYING  
5        SOMETHING THAT MAYBE WASN'T -- THEY WERE MISLED INTO BUYING  
6        WITH RESPECT TO THE OFFENDING PHRASES.

7                **THE COURT:**  DO YOU AGREE WITH THAT?

8                IS THAT YOUR UNDERSTANDING OF WHAT THEIR MONETARY DAMAGE  
9        THEORY WOULD HAVE BEEN?

10              **MR. NIERLICH:**  WELL, I RESPECTFULLY DISAGREE WITH THE  
11        IDEA THEY WOULD BE ENTITLED TO ANY DAMAGES SINCE WE HAD --

12              **THE COURT:**  RIGHT.  NO, I'M ASKING YOU WHAT THEIR  
13        THEORY WAS, NOT WHAT YOUR THEORY WAS.

14              **MR. NIERLICH:**  RIGHT.  MY UNDERSTANDING IS THAT  
15        PLAINTIFFS' THEORY OF DAMAGES INCLUDED SEVERAL ELEMENTS, WHICH  
16        WOULD BE INCLUDING RESTORATION OR RESTITUTION PURSUANT TO THE  
17        UNFAIR COMPETITION LAW, ACTUAL DAMAGES --

18              **THE COURT:**  GIVING THE MONEY BACK --

19                              (SIMULTANEOUS COLLOQUY.)

20              **MR. NIERLICH:**  AND POTENTIALLY OTHER DAMAGES.

21              **THE COURT:**  BY RESTITUTION, YOU MEAN GIVING BACK THE  
22        MONEY THEY PAID FOR THE PRODUCT?

23              **MR. NIERLICH:**  THAT'S RIGHT, SOME OR ALL OF IT.  
24        CORRECT.

25              **THE COURT:**  IT COULD BE SOME.  YOU COULD SAY, WELL, I



1 WOULD HAVE PAID \$3 HAD I KNOWN IT WAS FULL OF FAT, BUT I WOULD  
2 ONLY HAVE PAID -- I WOULD HAVE PAID \$4 HAD I REALLY THOUGHT IT  
3 WASN'T FULL OF FAT, OR SOMETHING LIKE THAT, SO THEN YOU WOULD  
4 GIVE THEM A DOLLAR BACK.

5 **MR. NIERLICH:** PRESUMABLY THEY WOULD HAVE HAD A  
6 DAMAGES EXPERT WHO WOULD HAVE LOOKED AT ISSUES LIKE THAT TO  
7 TRY AND DETERMINE SOME DELTA BETWEEN THE PRODUCT AS SOLD AND  
8 THE PRODUCT, AS THEY WOULD SAY, AS REPRESENTED. BUT, AGAIN,  
9 WE DISAGREE WITH THAT.

10 **THE COURT:** OKAY.

11 **MR. PIFKO:** YOUR HONOR, I FORGOT TO ADD, TOO,  
12 PROBABLY ONE OTHER ASPECT WE WOULD HAVE BEEN SEEKING WOULD  
13 HAVE BEEN SOME SORT OF CORRECTIVE ADVERTISING, YOU KNOW, LIKE  
14 MAKING THEM ISSUE A PUBLIC STATEMENT THAT, HEY, WE CHANGED  
15 THIS.

16 **THE COURT:** THAT REMINDS ME, THOUGH, DO YOU THINK IT  
17 WAS THE NOTICE TO THE CLASS ABOUT THE SETTLEMENT THAT TOLD A  
18 LOT OF PEOPLE WHAT THE COMPLAINT ABOUT THE PRODUCT ACTUALLY  
19 EVEN WAS?

20 **MR. PIFKO:** THAT'S WHAT MADE ME JUST THINK OF THAT  
21 POINT.

22 YES. I BELIEVE CLASS MEMBERS WOULD NOT -- THEY WOULDN'T  
23 HAVE KNOWN THAT THIS WAS GOING ON HAD IT NOT BEEN FOR THE  
24 NOTICE. THERE'S NO WAY THAT THEY WOULD HAVE -- YOU KNOW, THE  
25 WHOLE IDEA OF ALL THESE CASES AND THAT IT'S A MISLEADING,

1 FALSE ADVERTISING KIND OF CASE IS THAT THEY ARE BEING DUPED  
2 AND THEY DON'T KNOW. SO ABSENT, YOU KNOW, PUBLIC MESSAGE  
3 BEING DISSEMINATED, THERE'S NO WAY THAT PEOPLE WOULD KNOW.

4 **THE COURT:** SO A LOT OF -- THE WAY A LOT OF PEOPLE  
5 FOUND OUT ABOUT THIS WAS NOT BECAUSE OF FDA LABELING, OR  
6 ADVERTISING, OR ANYTHING ELSE, BUT BECAUSE THEY GOT A NOTICE  
7 ABOUT BEING A CLASS MEMBER --

8 **MR. PIFKO:** A HUNDRED PERCENT, I WOULD SAY, YEAH.

9 MAYBE ADD SOME MEDIA COVERAGE THAT TALKED ABOUT THE CASE.

10 **THE COURT:** OKAY. IS THERE ANYTHING ELSE THAT THE  
11 PLAINTIFFS WOULD LIKE TO ADD?

12 **MR. PIFKO:** I MEAN, I'M HAPPY TO RESPOND TO ANY  
13 SPECIFIC QUESTIONS. I DON'T WANT TO BELABOR POINTS THAT YOUR  
14 HONOR HAS ALREADY CONSIDERED.

15 JUST OVERALL, I THINK WE FEEL VERY PLEASED WITH THE  
16 RESULTS WE OBTAINED. WE THINK THAT CASH PAYMENTS, THE  
17 INJUNCTIVE RELIEF, AND THE PRODUCT DISTRIBUTIONS REALLY  
18 ACCOMPLISH THE GOALS OF THE LITIGATION. AND I THINK IT'S A  
19 FAIR AND REASONABLE SETTLEMENT UNDER THE CIRCUMSTANCES.

20 THERE WERE CERTAINLY ISSUES THAT WE WOULD HAVE FACED IN  
21 CONTINUING TO GO FORWARD, AND I THINK WE MADE AN APPROPRIATE  
22 COMPROMISE WITH THE SETTLEMENT THAT WE PROPOSED.

23 **THE COURT:** ANYTHING THE DEFENDANT WOULD LIKE TO ADD?

24 **MR. NIERLICH:** YOUR HONOR, IT'S OUR POSITION THAT THE  
25 SETTLEMENT TAKEN AS A WHOLE IS FAIR, REASONABLE, AND ADEQUATE

1 AND CONSISTENT WITH THE NINTH CIRCUIT AND OTHER GUIDANCE ON  
2 THE MATTER. IF THE COURT HAS NO FURTHER QUESTIONS, THEN I  
3 WILL LEAVE IT THERE.

4 **THE COURT:** ALL RIGHT.

5 SO, MR. CHAMBERLAIN, YOU HAD -- OR DO YOU STILL HAVE  
6 SOMETHING YOU WOULD LIKE TO SAY?

7 **MR. CHAMBERLAIN:** ABSOLUTELY.

8 **THE COURT:** WOULD ONE OF YOU CONCEDE YOUR PODIUM TO  
9 HIM?

10 **MR. CHAMBERLAIN:** THANK YOU, YOUR HONOR.

11 THE SETTLEMENT CAN'T BE APPROVED. I MEAN, IT HAS ALL  
12 THREE OF THE INDICIA OF SELF-DEALING THAT THE NINTH CIRCUIT  
13 IDENTIFIED IN BLUETOOTH; NAMELY, A CLEAR SAILING AGREEMENT OF  
14 SOMETHING LIKE A KICKER AND A DISPROPORTIONATE DISTRIBUTION.

15 THE PROPER VALUATION OF THE SETTLEMENT IS AT MOST  
16 \$2.25 MILLION BECAUSE NEITHER THE -- NEITHER THE PRODUCT  
17 DISTRIBUTION OR THE INJUNCTIVE RELIEF HAVE ANY REAL ECONOMIC  
18 VALUE TO THE CLASS.

19 SO WE'LL START WITH THE PRODUCT DISTRIBUTION BECAUSE  
20 THAT'S THE THING THAT'S GOTTEN THE MOST DISCUSSION.

21 **THE COURT:** LET ME ASK YOU FIRST: ARE YOU FAMILIAR  
22 WITH THE ORIGINAL SETTLEMENT?

23 **MR. CHAMBERLAIN:** NOT IN DETAIL, YOUR HONOR, NO.

24 **THE COURT:** SO YOU DON'T KNOW THE DIFFERENCES BETWEEN  
25 THE ORIGINAL SETTLEMENT THAT WAS NOT APPROVED AND THIS

1 SETTLEMENT THAT WAS APPROVED PRELIMINARILY; YOU DON'T KNOW  
2 THOSE DIFFERENCES?

3 **MR. CHAMBERLAIN:** YOU'RE RIGHT, YOUR HONOR, I DON'T.

4 **THE COURT:** YOU DON'T KNOW WHAT WAS CHANGED IN  
5 BETWEEN?

6 **MR. CHAMBERLAIN:** NO, I DON'T.

7 **THE COURT:** YOU ARE MISSING SOME IMPORTANT  
8 INFORMATION THERE.

9 **MR. CHAMBERLAIN:** I MEAN, ALL I AM DOING IS COMPARING  
10 THE SETTLEMENT THAT WAS OUT THERE THAT I RECEIVED NOTICE OF  
11 WITH THE APPLICABLE LAW, BLUETOOTH AND DENNIS.

12 **THE COURT:** YEAH. THE OTHER ONE IS IN THE DOCKET, OF  
13 COURSE, WASN'T IT? THERE WAS --

14 **MR. NIERLICH:** YES.

15 **MR. PIFKO:** YES.

16 **MR. CHAMBERLAIN:** YES.

17 **THE COURT:** -- A MOTION FOR PRELIMINARY APPROVAL.  
18 YOU DIDN'T READ THAT AND COMPARE WHAT WAS CHANGED IN BETWEEN?

19 **MR. CHAMBERLAIN:** YOUR HONOR, NO, I DIDN'T MAKE THAT  
20 SPECIFIC COMPARISON.

21 **THE COURT:** OKAY. AND THEN COULD YOU TELL ME YOUR  
22 ASSESSMENT OF THE VALUE OF THIS CASE, OR THE DIFFICULTY OF THE  
23 CASE, WHAT THE LEGAL THEORIES WERE, WHAT DIDN'T SURVIVE  
24 MOTIONS TO DISMISS, WHAT DID SURVIVE MOTIONS TO DISMISS, WHAT  
25 THE LIKELIHOOD WOULD BE OF THOSE CASES?

1           **MR. CHAMBERLAIN:** NO, YOUR HONOR. ALL I HAVE IS THE  
2 AGREEMENT THAT THE PARTIES MADE. AND I BASE MY ANALYSIS --

3           **THE COURT:** RIGHT. THE MOTIONS TO DISMISS ARE ALSO  
4 IN THE DOCKET.

5           **MR. CHAMBERLAIN:** YES, YOUR HONOR.

6           **THE COURT:** ONE COULD HAVE READ THOSE.

7           **MR. CHAMBERLAIN:** I MEAN, MY CONTENTION IS THAT  
8 ASSESSING THE ECONOMIC VALUE OF ANY SETTLEMENT IS  
9 EXTRAORDINARY AND DIFFICULT BECAUSE, I MEAN, WE HAVE TO KIND  
10 OF PLAY OUT HYPOTHETICALLY WHAT THE SETTLEMENT WOULD HAVE  
11 LOOKED LIKE. SO THE BEST PLACE TO START IS WITH THE NUMBER,  
12 THE AMOUNT OF CASH THAT THE PARTIES AGREED TO DISTRIBUTE.

13           **THE COURT:** YOU ARE NOT QUARRELING WITH THAT. YOU  
14 DON'T THINK IT'S WORTH MORE THAN 2.25 MILLION.

15           **MR. CHAMBERLAIN:** I THINK IT'S WORTH AT LEAST 2.25  
16 MILLION. MY ASSESSMENT IS THAT IT'S PROBABLY WORTH BETWEEN  
17 THREE TO 3.5, AND I WILL EXPLAIN WHY.

18           **THE COURT:** WHY? OKAY. EXPLAIN WHY THEN.

19           **MR. CHAMBERLAIN:** THE REASON IS THAT -- THE REASON IS  
20 THAT THERE ARE PROVISIONS IN THE AGREEMENT, AND THIS IS  
21 ACTUALLY IDENTIFIED IN BLUETOOTH, THE CLEAR SAILING PROVISION  
22 AND THE KICKER PROVISION THAT ARE EXPLICITLY THINGS THAT ARE  
23 UNIQUELY TO THE BENEFIT OF CLASS COUNSEL, AND THAT CLASS  
24 COUNSEL CONCEIVABLY WOULD HAVE HAD TO NEGOTIATE TO GET.  
25 THAT'S ACTUALLY IN THE BLUETOOTH OPINION.

1           **THE COURT:**   WHAT I'M INTERESTED IN IS WHAT YOU THINK  
2   THE VALUE OF THE CASE IS IN SETTLEMENT.

3           **MR. CHAMBERLAIN:**   I MEAN --

4           **THE COURT:**   YOU SAID IT WAS -- YOU SAID THIS  
5   SETTLEMENT IS REALLY 2.25 AND YOU THINK THE CASE IS WORTH AT  
6   LEAST 3.25.

7           **MR. CHAMBERLAIN:**   YES.

8           **THE COURT:**   AND I AM WONDERING WHY YOU THINK THAT IF  
9   YOU HAVEN'T READ THE MOTIONS TO DISMISS.

10          **MR. CHAMBERLAIN:**   SO I WANT TO CLARIFY. I THINK IT'S  
11   AT LEAST WORTH 2.25 AND PROBABLY WORTH A LITTLE MORE.

12          **THE COURT:**   A LITTLE MORE.

13          **MR. CHAMBERLAIN:**   IN THE NEIGHBORHOOD OF THREE.  
14   BECAUSE I COMPARE IT TO SIMILAR SETTLEMENTS WHERE --

15          **THE COURT:**   THAT'S WHAT I'M TRYING TO ASK IS, WHY DO  
16   YOU THINK IT'S WORTH THREE INSTEAD OF 2.25, ASSUMING IT'S  
17   WORTH 2.25?

18          **MR. CHAMBERLAIN:**   SO IN SIMILAR SETTLEMENTS WHERE THE  
19   ATTORNEYS NEGOTIATE OR ARE WILLING TO ONLY GET ABOUT 750,000  
20   IN FEES, THE CLASS RELIEF ENDS UP BEING IN THE NEIGHBORHOOD --  
21   OR THE TOTAL FUND ENDS UP BEING IN THE NEIGHBORHOOD OF  
22   \$3.5 MILLION.

23           FOR EXAMPLE, IN THE VIBRAM FIVEFINGERS SETTLEMENT RECENTLY  
24   IN THE DISTRICT OF MASSACHUSETTS, THAT WAS THE SETTLEMENT  
25   AGREEMENT THAT WAS FOUND. IT WAS 3.5 MILLION TOTAL FOR THE

1 FUND, AND THE LAWYERS WERE ONLY GETTING 775,000.

2 HERE, IF YOU THINK ABOUT IT, THESE PLAINTIFFS' LAWYERS  
3 WOULD HAVE BEEN MORE RELUCTANT TO TAKE THAT SETTLEMENT EVEN  
4 THOUGH IT WAS FAR BETTER FOR THE CLASS BECAUSE THE WAY THE  
5 SETTLEMENT IS STRUCTURED, TO FAVOR THE PLAINTIFFS' LAWYERS AT  
6 THE EXPENSE OF THE CLASS, MAKES IT SO THAT LESS RELIEF FOR THE  
7 CLASS IS ACTUALLY BETTER HERE. THAT'S THE REAL REASON.

8 THE REASON IT'S SUBSTANTIVELY UNFAIR IS NOT THAT  
9 NECESSARILY 2.25 IS THE WRONG NUMBER, BUT IT'S THAT BECAUSE OF  
10 THE STRUCTURE OF THE PROVISIONS, THAT IF YOU REDUCE THE  
11 ATTORNEYS' FEES, THEY -- YOU CAN'T INCREASE THE CLASS PAYOUT.  
12 THEY CAPPED THE CLASS PAYOUT AT A MILLION DOLLARS IN CASH.

13 BECAUSE YOU CAN'T DO THAT, YOU CAN'T GET THE CLASS THE  
14 RELIEF THAT GIBSON, DUNN IS WILLING TO PAY. THAT'S WHAT MAKES  
15 IT SUBSEQUENTLY UNFAIR. THAT'S ACTUALLY VERY SIMILAR TO THE  
16 NINTH CIRCUIT'S LOGIC IN THE BLUETOOTH CASE.

17 BUT TO GET TO THAT NUMBER, THERE HAS TO BE -- YOU HAVE TO  
18 VALUE THE PRODUCT DISTRIBUTION AND THE INJUNCTIVE RELIEF. I  
19 CONTEND THAT THE VALUE OF THOSE SHOULD BE NEGLIGIBLE.

20 SO, FIRST, ON THE PRODUCT DISTRIBUTION. THE BIG QUESTION  
21 IS, FIRST, WHETHER THIS IS ACTUALLY CY-PRES BECAUSE BOTH THE  
22 PARTIES SEEM -- PUSH THE ARGUMENT THAT IT'S NOT CY-PRES  
23 BECAUSE THERE'S A DIRECT DISTRIBUTION OF PRODUCT TO THE CLASS.

24 BUT THAT'S NOT A THEORY THAT THE NINTH CIRCUIT OR ANYONE  
25 ELSE HAS UPHELD. AND, INDEED, THE NINTH CIRCUIT IN LANE

1 TALKED ABOUT HOW CY-PRES IS JUST AN INDIRECT DISTRIBUTION TO  
2 THE CLASS AS OPPOSED TO A DIRECT MONETARY DISTRIBUTION.

3 AND I WOULD PROFFER THAT A DIRECT DISTRIBUTION WHERE YOU  
4 HAVE TO GO TO A CHARITABLE ATHLETIC EVENT TO GET A PRODUCT IS  
5 VERY INDIRECT AND VERY MUCH WITHIN CY-PRES. AND UNDER THE --

6 **THE COURT:** WHAT WOULD YOU SUGGEST? LETTING PEOPLE  
7 MAIL IN AND ASK BARS TO BE MAILED TO THEM?

8 **MR. CHAMBERLAIN:** I MEAN, ODDLY ENOUGH, COUPONS WOULD  
9 BE MUCH BETTER. RIGHT? THEY COULD -- FUNNY WAY TO THINK  
10 ABOUT IT, THIS IS SORT OF THE WORST COUPON IN THE WORLD, A  
11 COUPON YOU HAVE TO GO TO A MARATHON TO REDEEM. I MEAN, IF  
12 IT'S NOT CY-PRES, THAT'S ONE WAY OF THINKING ABOUT IT.

13 BUT I THINK THE BETTER -- THAT WOULD HAVE BEEN A BETTER  
14 SOLUTION FOR THE CLASS RATHER THAN HAVING TO GO TO ONE OF  
15 THESE EVENTS, DRIVE 30 MILES TO REDEEM -- TO GET A MUSCLE MILK  
16 LIGHT. THAT'S NOT A CLASS BENEFIT.

17 **THE COURT:** MIGHT HAVE BEEN CHEAPER FOR THE DEFENDANT  
18 TO DO THAT.

19 **MR. CHAMBERLAIN:** IT MIGHT WELL HAVE BEEN. BUT I  
20 THINK THAT THEY ARE LOSING OUT ON THE ADVERTISING BENEFITS OF  
21 HAVING THIS TABLE AT AN EVENT, AND ESPECIALLY WITH A WHOLE  
22 BUNCH OF PEOPLE WHO AREN'T CLASS MEMBERS, WHO AREN'T PEOPLE  
23 WHO PURCHASED MUSCLE MILK IN THE PAST. THESE ARE THE PEOPLE  
24 WHO, YOU KNOW, MARATHON RUNNERS WHO THEN WILL SEE MUSCLE MILK  
25 LIGHT AND WANT TO PURCHASE IT.



1 AND THAT'S THE PROBLEM IDENTIFIED BY THE NINTH CIRCUIT IN  
2 NACHSHIN AND DENNIS, IS THAT WHEN YOU LET THE PARTIES GET AWAY  
3 FROM THE NEXUS OF THE LAWSUIT WITH THEIR SELECTION OF CY-PRES  
4 RECIPIENTS, THEY DO IT TO SERVE THEIR SELF-INTERESTS AND NOT  
5 THE INTERESTS OF THE CLASS.

6 AND AS A CY-PRES RECIPIENT, THE CHARITABLE ATHLETIC  
7 EVENTS, THAT'S EXCLUDED UNDER DENNIS VERSUS KELLOGG. DENNIS  
8 SAYS THAT IT MUST BE TIED TO THE NATURE OF THE LAWSUIT. AND  
9 DENNIS IS DIRECTLY ON POINT. THAT SETTLEMENT WAS ABOUT FALSE  
10 ADVERTISING OF CEREAL. AND THE PARTIES WANTED TO DO A CY-PRES  
11 DISTRIBUTION WHERE THEY GIVE CEREAL TO, YOU KNOW, NONPROFITS  
12 THAT HELP FEED THE HUNGRY. AND THE NINTH CIRCUIT SAID THAT'S  
13 NOT THE NEXUS OF THE LAWSUIT. THE NEXUS OF THE LAWSUIT IS  
14 THIS IS FALSE ADVERTISING.

15 SO THE APPROPRIATE CY-PRES RECIPIENT IS A NONPROFIT  
16 DEDICATED TO STOPPING FALSE ADVERTISING TO MAKE CONSUMERS  
17 AWARE OF THAT. I MEAN, THAT'S DIRECTLY ON POINT. THERE'S NO  
18 DISCUSSION OF DENNIS -- OF THIS SUBSTANTIVE PART OF DENNIS IN  
19 THE PARTIES' RESPONSES TO MY OBJECTION.

20 AND THAT MEANS THAT IF YOU TREAT THIS AS CY-PRES, YOU HAVE  
21 TO VALUE IT AT ZERO. AND IF YOU DON'T TREAT IT AS CY-PRES,  
22 THAT DOESN'T -- THERE'S NOT REALLY AMAZING LAW SAYING THIS IS  
23 WHAT CY-PRES IS AND THIS IS WHAT CY-PRES ISN'T, BUT THE -- YOU  
24 STILL HAVE TO GIVE EXTREME SCRUTINY -- YOU HAVE GIVEN A GREAT  
25 DEAL OF SCRUTINY, YOUR HONOR, TO IT HERE, BUT EXTREME SCRUTINY

1 TO NONMONETARY RELIEF. AND HERE, I THINK IT DOESN'T HAVE REAL  
2 ECONOMIC VALUE TO THE CLASS. A CARTON OF MUSCLE MILK THAT YOU  
3 HAVE TO GO TO A MARATHON TO GET, IS ONE THAT VERY FEW CLASS  
4 MEMBERS WILL GO AND GET. AND THE FACT THAT THEY MAKE  
5 REASONABLE EFFORTS --

6 **THE COURT:** I DON'T KNOW WHY YOU SAY THAT.

7 **MR. CHAMBERLAIN:** JUST, I MEAN, I PERSONALLY AM NOT  
8 GOING TO GO TO SUSAN KOMEN TO PICK UP A MUSCLE MILK. THAT'S  
9 JUST MY PERSONAL VALUE --

10 **THE COURT:** RIGHT. I'M SURE THAT'S THE CASE, BUT  
11 THAT DOESN'T TELL ME TOO MUCH ABOUT THE OTHER THOUSANDS OF  
12 PEOPLE.

13 ANYWAY, GO AHEAD.

14 **MR. CHAMBERLAIN:** SO THAT'S A PROBLEM THERE.

15 SO I THINK THAT'S ENOUGH TO SAY THAT EVEN IF IT'S NOT  
16 CY-PRES, IT SHOULD STILL BE VALUED AS HAVING NEGLIGIBLE VALUE  
17 TO THE CLASS.

18 AND, MOREOVER, YOU HAVEN'T -- THERE'S NO POINT, EVEN AT  
19 THIS HEARING OR ANY FUTURE HEARING, IF YOU LOOK AT THEIR  
20 AGREEMENT, WHERE YOU FIND OUT HOW MANY CLASS MEMBERS ACTUALLY  
21 BENEFITED FROM THIS DISTRIBUTION. THEY WILL TELL YOU HOW MANY  
22 PRODUCTS THEY DISTRIBUTED, THEY WILL TELL YOU WHERE THEY  
23 DISTRIBUTED THEM, BUT THEY WON'T TELL YOU -- AND THEY CAN'T  
24 REALLY TELL YOU HOW MANY CLASS MEMBERS, HOW MANY PEOPLE WHO  
25 PURCHASED MUSCLE MILK IN THE LAST FIVE YEARS, WILL BENEFIT

1 FROM THIS DISTRIBUTION.

2 SO WITH THAT, I THINK THE NINTH CIRCUIT PRECEDENT REQUIRES  
3 THAT YOU FIND ITS VALUE TO BE NEGLIGIBLE.

4 ON THE INJUNCTIVE RELIEF, THE BIG PROBLEM WITH THE  
5 INJUNCTIVE RELIEF IS THAT IT'S DUPLICATIVE OF WORK THAT THE  
6 FDA IS ALREADY DOING. THIS WHOLE LAWSUIT IS BASED ON A FDA  
7 WARNING LETTER THAT WAS FILED TWO WEEKS BEFORE THE PLAINTIFFS  
8 FILED THEIR COMPLAINT OVER THE SAME FUNDAMENTAL CLAIMS.

9 **THE COURT:** WELL, PERHAPS SO, BUT IT HAD NOT BEEN  
10 DETERMINED WHAT THEY WOULD HAVE TO DO AND WHAT THEY WOULD HAVE  
11 HAD TO DO WAS NOT THE NOTICE TO THOUSANDS OF CLASS MEMBERS.

12 **MR. CHAMBERLAIN:** TRUE. AND I THINK IT IS FAIR TO  
13 SAY THAT THE NOTICE IS A CLASS BENEFIT FOR THAT REASON.

14 LIKE, I MEAN, ALL THE MONEY THAT'S SPENT TO GIVE PEOPLE  
15 NOTICE OF THE CLASS SETTLEMENT, BUT THAT'S NOT A REASON WHY  
16 THE INJUNCTIVE RELIEF IS A BENEFIT TO THE CLASS. THE  
17 INJUNCTIVE RELIEF IS CYTOSPORT SAYING, WE WOULDN'T DO THIS  
18 ANYMORE. AND THE FDA HAS ALREADY TOLD THEM NOT TO DO IT.

19 AND IF YOU LOOK AT THEIR AGREEMENT, THEY HAVE AGREED  
20 NOT -- THEY AGREED IN 2011 NOT TO INCLUDE THE WORDS "HEALTHY  
21 SUSTAINED ENERGY" ON THEIR PRODUCTS. AND THERE IS THIS  
22 QUESTION OF WHETHER OR NOT THEY HAD PREVIOUSLY AGREED TO USE  
23 THE WORD "HEALTHY FATS" ON THEIR PRODUCTS, BUT THERE'S ALSO --  
24 YOU KNOW, THERE'S A SPECIFIC EXHIBIT, THERE'S -- IT'S  
25 DOCUMENT 27, EXHIBIT C, AND IT TALKS ABOUT HOW THEY WERE

1 UNABLE TO GET A RESPONSE FROM THE FDA TO SOME OF THEIR  
2 DEFENSES TO THE ACCUSATION IN THE WARNING LETTER, AND THAT  
3 THEY HAVE UNDERTAKEN TO MAKE QUOTE "FURTHER REVISIONS  
4 INCORPORATING MANY OF THE CHANGES DEEMED NECESSARY IN THE  
5 WARNING LETTER."

6 WE DON'T KNOW WHAT THOSE -- OR I DON'T. I'M NOT SURE  
7 WHAT -- WHAT EXACTLY THEY ARE. BUT IF THEY ARE NO DIFFERENT  
8 THAN THE THINGS THAT THEY WERE DOING IN RESPONSE TO THE FDA'S  
9 PROMPTING, THE VALUE OF THAT INJUNCTION TO CLASS MEMBERS IS  
10 NEGLIGIBLE.

11 THE NOTICE MIGHT BE VALUABLE, KNOWING THAT THE PRODUCT IS  
12 NOT WORTH ANYTHING VALUABLE, BUT, INDEED, THE INJUNCTION  
13 DOESN'T ACTUALLY CREATE THE KNOWING. REMOVING THE WORDS  
14 "HEALTHY FATS" FROM THE SIDE OF THE BOTTLE, DOESN'T ITSELF  
15 INFORM CLASS MEMBERS. AND THAT'S WHAT THE INJUNCTIVE RELIEF  
16 IS ALL ABOUT.

17 SO, IN ADDITION, THE INJUNCTIVE RELIEF IS PROSPECTIVE. IT  
18 DOESN'T REMEDY HARMS TO CLASS MEMBERS DONE IN THE PAST. SO  
19 OUR CONTENTION -- MY CONTENTION IS THAT THAT SHOULD BE VALUED  
20 AT ZERO. AND AT THE POINT THAT IT'S VALUED AT ZERO, THE TOTAL  
21 VALUE OF THE SETTLEMENT IS 2.25 MILLION, AND THE ATTORNEYS'  
22 FEES ARE 990,000 SOMETHING. I DON'T REMEMBER THE EXACT  
23 FIGURE, BUT IT'S SOMETHING IN THAT NEIGHBORHOOD. I'M NOT SURE  
24 WHAT THE FIGURE ON THAT IS, BUT THAT'S WELL ABOVE 25 PERCENT,  
25 THAT'S WELL ABOVE THE BENCHMARK IN BLUETOOTH THAT THE NINTH

1 CIRCUIT HAS SET --

2 **THE COURT:** WHAT ABOUT THE LODESTAR?

3 **MR. CHAMBERLAIN:** THE LODESTAR, YOUR HONOR, WHEN --  
4 IS -- CAN BE USED AS A CROSS-CHECK TO ENSURE THAT THE  
5 PERCENTAGE OF -- THE AMOUNT OF MONEY IS NOT A WINDFALL, BUT IN  
6 A SITUATION WHERE THE OVERALL SETTLEMENT VALUE IS PRETTY  
7 SMALL, THE NEED FOR A LODESTAR CROSS-CHECK -- THE LODESTAR IS  
8 JUST A WORST METHOD TO USE THAN PERCENTAGE OF THE FUND,  
9 BECAUSE PERCENTAGE OF THE FUND ALIGNS THE INCENTIVES.

10 **THE COURT:** IS THERE ANYTHING WRONG WITH USING A  
11 LODESTAR?

12 **MR. CHAMBERLAIN:** UM, I'M NOT ACTUALLY SURE, YOUR  
13 HONOR, WHAT THE LAW IS WHEN THE PARTIES REQUEST PERCENTAGE OF  
14 THE FUND OR THAT THEIR FEES BE CALCULATED.

15 **THE COURT:** WHEN WHAT? I AM SORRY.

16 **MR. CHAMBERLAIN:** WHEN THE --

17 **THE COURT:** "I'M NOT SURE WHAT THE LAW IS WHEN" WHAT?

18 **MR. CHAMBERLAIN:** WHEN THE PARTIES REQUEST THAT THE  
19 FEE BE CALCULATED AS A PERCENTAGE OF THE FUND, BUT THEY ALSO  
20 PRESENT A LODESTAR FIGURE, I'M NOT SURE WHAT THE LAW IS WITH  
21 REGARD TO YOUR DISCRETION AS TO UNILATERALLY APPLY THE  
22 LODESTAR FIGURE.

23 I THINK THAT PERCENTAGE OF THE FUND IS THE BEST WAY  
24 BECAUSE IT ALIGNS THE INCENTIVES OF THE PLAINTIFFS AND THE  
25 REST OF THE CLASS. THE MORE RECOVERY THEY GET FOR THE CLASS,

1 THE MORE THEY GET THEMSELVES.

2 AND PART OF THE PROBLEM WITH THE SETTLEMENT IS THE  
3 DIFFERENT, YOU KNOW, THINGS THAT THEY HAVE ADDED, THE  
4 INJUNCTIVE RELIEF AND THE PRODUCT DISTRIBUTION, CREATE THE  
5 ILLUSION OF GREATER RELIEF THAN THERE REALLY IS IN ORDER TO  
6 JUSTIFY A GREATER FEE. AND THAT'S PART OF THE INDICIA OF  
7 SELF-DEALING THAT THE NINTH CIRCUIT IDENTIFIED IN BLUETOOTH.

8 THOSE ARE THE TWO MAJOR REASONS WHY THE SETTLEMENT'S  
9 UNFAIR. YOU HAVE ALL THREE OF THE FACTORS IN BLUETOOTH.  
10 THERE'S ALSO THE KIND OF -- ONE TRICKY ISSUE IS THIS KICKER  
11 ARGUMENT.

12 NORMALLY, A KICKER IS JUST A PROVISION THAT SAYS IF THE  
13 COURT REDUCES THE FEE, THAT MONEY WILL GO BACK TO THE  
14 DEFENDANT. SO THAT'S NOT PRESENT HERE. BUT THEY HAVE A SET  
15 OF PROVISIONS THAT ENSURE THAT IF YOU REDUCE THE FEE, WHAT  
16 HAPPENS IS, THE OVERALL AMOUNT OF PRODUCT DISTRIBUTIONS GOES  
17 UP. BUT THAT'S EFFECTIVELY THE SAME THING AS A KICKER.

18 BECAUSE IF CYTOSPORT IS PRESENTED WITH THE OPTION OF  
19 GIVING -- EITHER PAYING \$5 TO A CLASS MEMBER OR GIVING AWAY A  
20 CARTON OF MUSCLE MILK, WHICH THEY ARE IN THE BUSINESS OF  
21 MAKING, THEY WILL ALWAYS CHOOSE GIVING AWAY THE MUSCLE MILK.  
22 AND IT HAS THE EFFECT OF MASSIVELY REDUCING THE OVERALL COST  
23 TO CYTOSPORT OF THE SETTLEMENT.

24 AND GIVEN, AGAIN, THAT THE PRODUCT DISTRIBUTION HAS SUCH A  
25 WEAK NEXUS TO THE CLASS, SO FEW CLASS MEMBERS WILL CONSUME THE

1 CYTOSPORT AT THESE CHARITABLE EVENTS, IT'S FUNCTIONALLY THE  
2 SAME THING AS THE KICKER.

3 AND WHAT THE NINTH CIRCUIT EMPHASIZED IN BLUETOOTH AND  
4 DENNIS IS THAT THIS IS A HOLISTIC EVALUATION OF THE  
5 SETTLEMENT. THE PARTIES MIGHT TRY AND SAY, NO, THIS ISN'T  
6 TECHNICALLY A KICKER, THEREFORE, YOU DON'T HAVE TO TREAT IT AS  
7 AN INDICATOR OF SELF-DEALING, BUT, YOU KNOW, THE PURPOSE HERE  
8 IS TO FIGURE OUT WHETHER THE SETTLEMENT IS FAIR. AND IF A SET  
9 OF PROVISIONS HAS THE SAME FUNCTIONS AS A KICKER, IT SHOULD BE  
10 TREATED AS SUCH AND SEEN AS THE INDICIA OF SELF-DEALING THAT  
11 IT IS.

12 BUT, WITH THAT, I THINK THOSE ARE MY MAJOR OBJECTIONS.

13 **THE COURT:** DID YOU WANT TO RESPOND?

14 **MR. NIERLICH:** IF I MAY, YOUR HONOR.

15 MR. CHAMBERLAIN'S OBJECTIONS APPEAR TO BOIL DOWN TO HIM  
16 SUGGESTING THAT HE THINKS PERHAPS MORE CASH SHOULD HAVE BEEN  
17 PROVIDED TO MEMBERS OF THE CLASS.

18 I NOTE HE DESCRIBED THAT THE AGREEMENT CAPPED THE CLASS  
19 PAYOUT AT \$1 MILLION. AND AS YOUR HONOR WILL REMEMBER, IN THE  
20 ORIGINAL VERSION OF THE SETTLEMENT AGREEMENT, IT PROVIDED FOR  
21 CLASS MEMBERS, PROPOSED CLASS MEMBERS TO MAKE A CLAIM, AND  
22 THEN TO PAY UP TO \$30.

23 IN THE REVISED SETTLEMENT, IT PROVIDED FOR A \$1 MILLION  
24 FUND. AS IT TURNS OUT, DUE TO THE NUMBER OF CLAIMANTS, THE  
25 CLAIMANTS WILL RECEIVE APPROXIMATELY \$30. IN OTHER WORDS, THE

1 AMOUNT THAT WOULD HAVE BEEN --

2 **THE COURT:** ODDLY ENOUGH.

3 **MR. NIERLICH:** -- THE MAXIMUM PREVIOUSLY. JUST  
4 WORKED OUT WE GOT ABOUT 33,000 CLAIMANTS.

5 SO, IN FACT, THAT MILLION-DOLLAR FUND DID NOT ACT AS SOME  
6 CAP. HAD WE GONE UNDER THE ORIGINAL SETTLEMENT AGREEMENT,  
7 WE'D BE DISTRIBUTING, YOU KNOW, PERHAPS A LITTLE BIT LESS  
8 BECAUSE IT PROVIDED FOR UP TO \$30 INSTEAD OF \$30.

9 **THE COURT:** UP TO \$30 WHAT, BASED ON HOW MUCH THEY  
10 HAD BOUGHT, OR SOMETHING LIKE THAT?

11 **MR. NIERLICH:** BASED ON CLAIMS PROCEDURE THAT  
12 INCLUDED SOME FACTORS SUCH AS VOLUME OF PURCHASE. AND THEN  
13 THE REVISED SETTLEMENT AGREEMENT PROVIDED AN EASIER CLAIMS  
14 PROCESS WHICH ONE HOPES RESULTED IN ADDITIONAL CLAIMS BEING  
15 ABLE TO BE MADE. BUT, IN ANY EVENT, I NOTE \$30 PROVIDED.

16 MR. CHAMBERLAIN HAS NOT PROVIDED ANY EVIDENCE INDICATING  
17 WHAT HE THINKS THE VALUE OF ANY SETTLEMENT HERE SHOULD HAVE  
18 BEEN, IF NOT THE VALUE OF THE SETTLEMENT THAT WAS PROVIDED  
19 HERE, AND INSTEAD SEEMS TO FOCUS HIS OBJECTIONS ON THE NOTION  
20 THAT THE PRODUCT DISTRIBUTION AND INJUNCTIVE RELIEF ARE BOTH  
21 WORTHLESS.

22 **THE COURT:** I THINK THE BASIC ARGUMENT IS THAT THE  
23 VALUE OF THE SETTLEMENT IS REALLY THE AMOUNT OF CASH THAT WAS  
24 PAID BECAUSE THAT'S THE AMOUNT YOUR CLIENT WAS WILLING TO PAY  
25 IN CASH AND, THEREFORE, THE VALUE OF THE SETTLEMENT IS 2.25.



1 AND, THEREFORE, AT A PERCENTAGE OF COMMON FUND THEORY LESS  
2 SHOULD HAVE BEEN GIVEN TO ATTORNEYS' FEES.

3 **MR. NIERLICH:** BUT THE ANALYSIS IS NOT THE AMOUNT OF  
4 PAIN THAT IS VISITED UPON THE DEFENDANT. THE ANALYSIS IS THE  
5 BENEFIT TO THE CLASS.

6 AND CERTAINLY HAVING PRODUCT DISTRIBUTED IS A BENEFIT TO  
7 THE CLASS. ONE MAY QUIBBLE WITH THE PRECISE VALUATION, BUT TO  
8 SAY THAT IT'S WORTHLESS SEEMS TO ME TO NOT FIT WITH REALITY.  
9 I MEAN, THERE'S CLEARLY A BENEFIT TO HAVING THE PRODUCT  
10 DISTRIBUTED, AND THIS IS NOT CY-PRES. THIS IS A PRODUCT  
11 DISTRIBUTION. IT'S ANOTHER WAY TO REACH CLASS MEMBERS.  
12 AND --

13 **THE COURT:** ORIGINALLY YOU WERE PLANNING ON GIVING IT  
14 OUT TO PEOPLE IN HOSPITALS AND CHILDREN, OR SOMETHING LIKE  
15 THAT, AND I --

16 **MR. NIERLICH:** RIGHT.

17 **THE COURT:** -- I TAKE SOME ISSUE WITH THAT, AND YOU  
18 CHANGED IT TO THIS.

19 **MR. NIERLICH:** THAT'S RIGHT, YOUR HONOR.

20 **THE COURT:** IT'S A DIFFERENT PRODUCT THAT YOU WERE  
21 GOING TO GIVE OUT BEFORE.

22 **MR. NIERLICH:** CORRECT. AND THE EFFORT HERE HAS BEEN  
23 TO TRY TO MAKE SURE THAT WE HAVE THAT NEXUS AND WE ARE ACTING  
24 CONSISTENTLY WITH THE NINTH CIRCUIT'S GUIDANCE IN THAT REGARD.

25 MR. CHAMBERLAIN CITED THE NACHSHIN V. AOL CASE, AND IN

1 THAT CASE THE NINTH CIRCUIT TELLS US THAT THERE MUST BE A  
2 DRIVING NEXUS BETWEEN THE PLAINTIFF CLASS AND THE CY-PRES  
3 BENEFICIARIES. AND SO EVEN IF YOU WERE TO GIVE US A CY-PRES,  
4 WHICH I WOULD NOT SAY IT IS, I THINK IT'S A PRODUCT  
5 DISTRIBUTION TO THE CLASS, THERE IS STILL A NEXUS.

6 THE PLAINTIFFS IN THEIR PAPERS CITED THE FACT THAT MUSCLE  
7 MILK PRODUCTS ARE TARGETED TO PEOPLE WITH AN ACTIVE LIFESTYLE.  
8 THE CLAIMS IN THIS CASE HAVE TO DO WITH USE OF THE WORD  
9 "HEALTHY", AND THE EVENTS TARGETED ARE CHARITABLE ATHLETIC  
10 EVENTS RELATED TO HEALTH THEMES.

11 I MEAN, THERE HAS BEEN A SUBSTANTIAL EFFORT HERE TO TARGET  
12 THIS TO TRY AND MAKE SURE THAT THE PRODUCT DISTRIBUTION, TO  
13 THE EXTENT FEASIBLE, IS GOING TO BE TARGETED TO CLASS MEMBERS,  
14 AND SO I SUGGEST THAT YOU SHOULD LOOK AT IT THAT WAY. BUT  
15 EVEN IF YOU LOOKED AT IT AS CY-PRES, IT WOULD MEET THE  
16 REQUIREMENTS UNDER THE NINTH CIRCUIT STANDARDS.

17 **THE COURT:** ANY PARTICULAR REASON YOU DIDN'T AGREE ON  
18 COUPONS OR MAILING PEOPLE MUSCLE MILK BARS?

19 **MR. NIERLICH:** WELL, TO DISTRIBUTE -- THE QUESTION IS  
20 WHAT YOU ARE TRYING TO ACCOMPLISH. AND IF YOU ARE TRYING TO  
21 REACH A BROADER SWATH OF THE CLASS, THEN SIMPLY GIVING  
22 SOMETHING ELSE TO PEOPLE WHO FILED A CLAIM, IS NOT REACHING  
23 MORE PEOPLE AND MAYBE GIVING A LITTLE SOMETHING MORE TO THOSE  
24 PEOPLE, BUT THOSE PEOPLE ARE ALREADY RECEIVING AS MUCH OR MORE  
25 THAN THEY WOULD HAVE UNDER THE ORIGINAL SETTLEMENT, GETTING

1       \$30 IN CASH.

2               SO THE PRODUCT DISTRIBUTION PROVIDES YOU AN OPPORTUNITY TO  
3       HAVE ANOTHER AVENUE FOR REACHING MEMBERS OF THE CLASS, AND TRY  
4       TO BROADEN THAT REACH.

5               SO I WOULD SAY THAT IS ANOTHER ADVANTAGE OF THE PRODUCT  
6       DISTRIBUTION. PLUS, FRANKLY, JUST THE COST OF MAILING A  
7       BOTTLE OF LIQUID PRODUCT WOULD BECOME --

8               **THE COURT:** WELL, THAT WOULD BE A PROBLEM.

9               **MR. NIERLICH:** -- VERY EXPENSIVE.

10              **THE COURT:** BUT THE BAR WOULDN'T BE SO BAD.

11              **MR. NIERLICH:** THAT'S TRUE --

12              **THE COURT:** YOU HAVE TO GO INTO ALL THE CAFA  
13       REQUIREMENTS ABOUT COUPON SETTLEMENTS.

14              **MR. NIERLICH:** ONE MIGHT WANT TO STAY CLEAR OF THOSE  
15       WHERE POSSIBLE.

16              **THE COURT:** OKAY. WAS THERE ANYTHING ELSE?

17              **MR. NIERLICH:** I WAS JUST GOING TO SAY WITH RESPECT  
18       TO THE INJUNCTIVE RELIEF, IF I MAY, AN FDA WARNING LETTER IS  
19       NOT A FINAL ACTION OR REQUIREMENT OF THE FDA. THERE WAS NO  
20       REQUIREMENT BY THE FDA TO UNDERTAKE THE STEPS THAT ARE  
21       REFLECTED IN THE INJUNCTIVE RELIEF IN THIS CASE.

22              IF THE INJUNCTIVE RELIEF IN THIS CASE -- I MEAN, FROM OUR  
23       PERSPECTIVE, IT CERTAINLY ISN'T WORTHLESS. IT CERTAINLY  
24       DOESN'T HAVE NO IMPACT ON THE COMPANY.

25              I UNDERSTAND THE PLAINTIFFS HAVE MADE THE POSITION THAT IT

1 ADDRESSES THE CLAIMS THEY RAISED. AND WHILE WE DISAGREE WITH  
2 THEM ABOUT THE MERITS OF THEIR CLAIMS, THE FACT REMAINS THAT  
3 THE INJUNCTIVE RELIEF DIRECTLY ADDRESSES THE CLAIMS THEY MADE.

4 **THE COURT:** OKAY. DID YOU WANT TO RESPOND?

5 **MR. PIFKO:** YES, THANK YOU, YOUR HONOR. I WON'T MAKE  
6 IT TOO LONG. I WANTED TO ECHO A COUPLE OF MR. NIERLICH'S  
7 POINTS AND ADD A COUPLE OF MY OWN.

8 FIRST, WITH RESPECT TO THE PRODUCT DISTRIBUTION, I  
9 COMPLETELY ECHO THE POINT THAT PART OF THE POINT OF PROVIDING  
10 DISTRIBUTIONS OF PRODUCT IS TO REACH A BROADER GROUP. YOU  
11 KNOW, IF WE JUST SENT COUPONS, WE WOULD BE SENDING THE SAME --  
12 THE ONLY PEOPLE WHO WOULD BENEFIT ARE THE 33,000 PEOPLE WHO  
13 CAME FORWARD AND MADE CLAIMS.

14 AS YOU KNOW IN YOUR EXPERIENCE IN DEALING WITH ALL THESE  
15 CASES, YOU ARE ONLY GETTING A NARROW SEGMENT OF PEOPLE  
16 NECESSARILY WHO COME FORWARD AND MAKE CLAIMS. BY COMING UP  
17 WITH AN ALTERNATIVE METHOD TO REACH CLASS MEMBERS AND PROVIDE  
18 THEM WITH THESE PRODUCTS, WE'RE DISTRIBUTING THE BENEFITS OF  
19 THE SETTLEMENT TO A MUCH BROADER AUDIENCE. AND I THINK THAT  
20 THAT'S A SIGNIFICANT ROLE.

21 AND WE KNOW THAT THESE CLASS MEMBERS ALLEGED IN OUR  
22 COMPLAINT, WE KNOW THEY WERE INTERESTED IN PRODUCTS THAT THEY  
23 THOUGHT WERE HIGH PROTEIN PRODUCTS THAT DIDN'T CONTAIN A LOT  
24 OF FAT AND LOW CALORIES, AND THAT'S WHAT THEY ARE GOING TO GET  
25 WHEN THEY GET THE LIGHT PRODUCT DISTRIBUTED TO THEM AT THESE

1 EVENTS.

2 AND OUR CONSUMER RESEARCH EFFORTS DONE IN CONNECTION WITH  
3 CLASS CERT IN THIS CASE FOUND THAT ABOUT 62 PERCENT OF CLASS  
4 MEMBERS CONSUME THESE PRODUCTS WHILE AT ATHLETIC EVENTS OR IN  
5 THE CONDUCT OF DOING SOMETHING ACTIVE LIKE THIS. SO WE FELT  
6 THAT PROVIDING IT AT THESE KINDS OF EVENTS IS A WAY YOU ARE  
7 GOING TO FIND CLASS MEMBERS, ASIDE FROM JUST PUTTING OUT THE  
8 NOTICE IN THE PAPER AND GETTING PEOPLE TO MAKE CLAIMS.

9 **THE COURT:** OTHERWISE HOW ELSE WOULD YOU GET LARGE  
10 GROUPS OF ATHLETES IN A SINGLE PLACE? I SUPPOSE --

11 **MR. PIFKO:** EXACTLY.

12 **THE COURT:** -- GO TO GYMS, I GUESS, AND GIVE IT OUT  
13 AT GYMS.

14 **MR. PIFKO:** EXACTLY.

15 I WANTED TO COMMENT THAT MR. CHAMBERLAIN'S POINT THAT, OH,  
16 WELL, CLASS MEMBERS HAVE TO GO AND SEEK THESE EVENTS OUT.  
17 THAT'S THE TAIL WAGGING THE DOG.

18 WE ARE NOT TRYING TO GET THE SAME 33,000 PEOPLE JUST TO GO  
19 TO THESE EVENTS. WE ARE TRYING TO REACH OTHER PEOPLE WHO  
20 DIDN'T KNOW ABOUT THIS ALREADY AND ARE GOING TO SEE IT WHILE  
21 THEY'RE AT THE EVENT. SO I ECHO THAT IT'S ANOTHER WAY TO  
22 BROADEN THE DISTRIBUTION.

23 I ALSO WANTED TO NOTE AS FAR AS THE VALUE OF THE PRODUCTS  
24 IN RESPONSE TO ONE OF MR. CHAMBERLAIN'S COMMENTS, THE  
25 BLUETOOTH CASE ACTUALLY EXPRESSLY SAYS, AND ITS CITED THAT --

1 THE SAME POINT IS CITED IN MR. CHAMBERLAIN'S PAPERS THAT THE  
2 SETTLEMENT SHOULD BE VALUED ON HOW MUCH THE BENEFIT IS TO THE  
3 CLASS, NOT ON WHAT THE COMPANY HAS TO SPEND FOR THAT BENEFIT.

4 SO, LIKE MR. NIERLICH SAID, IT'S NOT SOME SORT OF PUNITIVE  
5 OR HOW MUCH DOES IT HURT THE COMPANY, YOU'RE SUPPOSED TO VALUE  
6 IT ON, BASED ON THE BENEFIT THE CLASS IS RECEIVING.

7 SO, HERE, THEY ARE RECEIVING PRODUCTS THEY OTHERWISE WOULD  
8 HAVE HAD TO PAY OUT OF POCKET FOR THE RETAIL AMOUNT. BY  
9 GIVING THEM THAT FOR FREE, YOU ARE GIVING THEM THAT MONETARY  
10 BENEFIT.

11 I WANTED TO RESPOND THAT WITH RESPECT TO THE INJUNCTIVE  
12 RELIEF, IN THE NINTH CIRCUIT'S MOST RECENT RESPONSE TO ONE  
13 MR. FRANK'S OBJECTIONS, THEY ACTUALLY SAID THAT IN REMANDING  
14 TO THE DISTRICT COURT, THEY SAID THAT THE DISTRICT COURT  
15 SHOULD ALSO CONSIDER THE VALUE OF THE INJUNCTIVE RELIEF IN  
16 THIS PARTICULAR SETTLEMENT THAT WAS AT ISSUE.

17 SO I THINK FOR MR. CHAMBERLAIN TO SAY THAT THE COURT  
18 SHOULDN'T CONSIDER IT IS ACTUALLY CONTRARY TO WHAT THE NINTH  
19 CIRCUIT WANTS DISTRICT COURTS TO DO HERE. I UNDERSTAND THAT  
20 IT'S HARD TO PUT A SPECIFIC NUMBER ON IT, BUT THE COURT IS  
21 SUPPOSED TO GIVE IT SOME CONSIDERATION.

22 AND I DO AGREE THAT, YOU KNOW, THE FDA DIDN'T REQUIRE THEM  
23 TO DO ANYTHING. WE -- ACTUALLY THAT WAS A POINT I THINK WE  
24 LITIGATED IN THIS COURTROOM, AND I REMEMBER ARGUING WITH THEM  
25 ABOUT WHETHER THE FDA HAD MADE A FINAL DETERMINATION ON THIS

1       ISSUE OR NOT.  AND ULTIMATELY THEY -- YOU KNOW, THE SECOND  
2       LETTER THAT HE CITES WAS ABOUT -- THAT THEY WERE CHANGING  
3       THEIR LABELS, WAS SENT TO THE FDA AFTER OUR CASE WAS FILED.

4               SO I THINK OUR CASE HAD AN IMPACT ON THAT DECISION WHICH,  
5       AGAIN, THEY COULD HAVE GONE BACK ON IT ANY TIME.  HERE NOW,  
6       UNDER THE SETTLEMENT, THERE'S AN INJUNCTION AND THEY ARE  
7       REQUIRED TO MAKE THAT CHANGE.

8               **THE COURT:**  SO WHAT'S THE STATUS OF THE FDA NOW?  THE  
9       FDA WAS SATISFIED BY THIS OUTCOME AND ISN'T PURSUING THEM  
10      ANYMORE?

11              **MR. PIFKO:**  I WOULD HAVE TO LET MR. NIERLICH SPEAK TO  
12      THAT, BUT IT'S MY UNDERSTANDING THEY JUST -- I DON'T BELIEVE  
13      THEY HAVE PROVIDED A FURTHER RESPONSE.

14              AND TYPICALLY REGULATORY AGENCIES, AS YOU PROBABLY KNOW,  
15      SAY OUR LACK OF RESPONSE DOESN'T MEAN THAT WE AGREE WITH  
16      ANYTHING, WE'RE JUST AREN'T RESPONDING ANY FURTHER.  I WOULD  
17      HAVE TO LEAVE THAT TO MR. NIERLICH.

18              I JUST WANT TO ALSO ADD THAT, YOU KNOW, AS FAR AS THE --  
19      EVEN IF THE COURT WERE TO ACCEPT MR. CHAMBERLAIN'S VALUE OF  
20      THE CASE, IF THERE'S NO -- I GUESS, YOU KNOW, MAYBE THAT WAS  
21      WHERE YOU WERE GETTING WITH YOUR INITIAL QUESTION HERE, IF THE  
22      COURT WERE TO APPLY -- THERE'S NO REASON WHY THE COURT JUST  
23      COULDN'T APPLY THE LODESTAR FACTOR HERE.  HAD THIS SETTLEMENT  
24      ONLY BEEN INJUNCTIVE RELIEF, WE COULD HAVE COME INTO THE COURT  
25      AND SAID, OKAY, WE DIDN'T GET ALL THE OTHER THINGS THAT WE

1 GOT, BUT WE DID GET THEM TO CHANGE THE LABELS AND WE COULD  
2 HAVE MADE A LODESTAR REQUEST FOR OUR FEES, AND THE COURT COULD  
3 HAVE EVALUATED IT AS SUCH.

4 SO I JUST WANT TO SAY FOR ARGUMENT SAKE THAT EVEN IF YOU  
5 WERE TO ACCEPT HIS VALUATION, I DON'T BELIEVE THAT THAT HAS TO  
6 IMPACT THE COURT'S ANALYSIS ON THE CALCULATION OF THE ATTORNEY  
7 FEE REQUEST.

8 **THE COURT:** OKAY. IF YOU CAN JUST ANSWER THE  
9 QUESTION ABOUT THE STATUS OF THE FDA, IF YOU ARE ABLE TO TELL  
10 US.

11 **MR. NIERLICH:** SURE. AND I DON'T WANT TO OVERSTATE  
12 MY ONLY KNOWLEDGE TO THE COURT, YOUR HONOR, BUT IT'S MY  
13 UNDERSTANDING THAT THE FDA HAS NOT ISSUED ANY REQUIREMENT TO  
14 DO WHAT HAS BEEN DONE IN THE INJUNCTIVE RELIEF IN THIS CASE.

15 **THE COURT:** THE FDA WAS NOTIFIED OF WHAT YOU HAD  
16 DONE?

17 **MR. NIERLICH:** I DON'T WANT TO OVERSTEP MY KNOWLEDGE  
18 SPECIFICALLY, BUT IT WOULD BE SURPRISING IF THEY WEREN'T AWARE  
19 OF THE LABELS AS THEY SIT IN THE MARKET TODAY.

20 **THE COURT:** MR. CHAMBERLAIN, DID YOU HAVE ANYTHING  
21 ELSE YOU WANTED TO SAY?

22 **MR. CHAMBERLAIN:** NOT AT THIS TIME, YOUR HONOR.

23 **THE COURT:** OKAY.

24 WELL, I'M INCLINED TO APPROVE THE SETTLEMENT. I THINK  
25 THAT ONE THING ONE HAS TO LOOK AT IN A SETTLEMENT OF A CLASS



1 ACTION CLAIM IS THE VALUE OF THE CLAIM AND THE LIKELIHOOD OF  
2 SUCCESS AND THE LIKELIHOOD OF RECOVERY.

3 AND THIS CASE, I THINK, WAS QUITE A DIFFICULT CASE FOR THE  
4 PLAINTIFF AS EVIDENCED BY THE TWO MOTIONS TO DISMISS WE HAD  
5 AND I THINK A NUMBER OF THE CLAIMS WERE NOT ALLOWED TO  
6 PROCEED. AND EVEN THE ONES THAT WERE, HAD SUBSTANTIAL  
7 CRITICISM LEVELED AT THEM, WHICH COULD HAVE WON THE DAY. SO,  
8 IT'S ALWAYS HARD TO MONETIZE THE VALUE OF CAUSES OF ACTION,  
9 BUT IT CERTAINLY THERE WERE SOME DIFFICULT LEGAL ISSUES HERE.

10 SECONDLY, I WOULD SAY THAT THE INITIAL SETTLEMENT I DID  
11 HAVE SEVERE PROBLEMS WITH, AS I THINK I STATED AT THE TIME,  
12 AND SETTLEMENT WAS GREATLY IMPROVED IN RESPONSE TO THE  
13 COMMENTS THAT I HAD MADE THE FIRST TIME AROUND, I THINK.

14 NEXT, I WOULD SAY WHILE IT IS EXTREMELY DIFFICULT TO VALUE  
15 AN INJUNCTION, I DO PUT VALUE ON THIS INJUNCTION. I CAN'T  
16 MONETIZE IT, AGAIN, BUT I DO THINK IT WAS VALUABLE. AND AS  
17 SOMEBODY SAID, THE NOTICE ITSELF WAS VALUABLE, WHICH IS A  
18 LITTLE BIT DIFFERENT FROM THE INJUNCTION, BUT IT IS A METHOD  
19 WHEREBY PEOPLE WHO THOUGHT THEY WERE GETTING HEALTHY FOOD  
20 PERHAPS WERE NOTIFIED THAT IT WASN'T AS HEALTHY AS THEY  
21 THOUGHT, BOTH BY WAY OF THE NOTICE AND THEN PERHAPS BY WAY OF  
22 THE INJUNCTION AND FURTHER BY WAY OF JUST THE CHANGES ON THE  
23 LABELS. AND THAT'S NOT ONLY FUTURE BUYERS, BUT PAST BUYERS.

24 SO, AGAIN, WHILE IT'S HARD TO SET A NUMBER ON IT, I DO  
25 PLACE VALUE ON IT.

1 THE PRODUCT DISTRIBUTION, ONE COULD LOOK AT IN DIFFERENT  
2 WAYS. IT IS -- WILL GO TO AT LEAST PEOPLE WHO MIGHT HAVE BEEN  
3 CLASS MEMBERS. MANY OF THEM I'M SURE WERE CLASS MEMBERS. IT  
4 WILL HAVE SOME BENEFIT TO CLASS MEMBERS IN THAT THEY WILL EAT  
5 MUSCLE MILK LIGHT AND DECIDE IT IS AS GOOD OR BETTER THAN  
6 MUSCLE MILK NOT LIGHT, AND WILL BE, ONE HOPES, A BENEFIT TO  
7 THEM.

8 THE INFORMATIONAL DEFICITS THAT LED TO THE DENNIS V.  
9 KELLOGG OR KELLOGG V. DENNIS CASE, WHICHEVER IT IS, AREN'T  
10 HERE BECAUSE THE SETTLEMENT RESPONDS TO THOSE ISSUES AND  
11 ADDRESSES THEM.

12 ONE MIGHT QUESTION THE VALUE PLACED ON IT. ONE MIGHT SAY  
13 IT'S NOT WORTH RETAIL, AND MAYBE THAT'S TRUE, BUT IT'S  
14 CERTAINLY OF VALUE. IT'S OF VALUE TO THE PEOPLE WHO GET IT.  
15 IT'S A VALUE TO -- TO THE EXTENT THEY'RE CLASS MEMBERS, IT'S A  
16 VALUE TO CLASS MEMBERS. TO THE EXTENT THEY ARE NOT CLASS  
17 MEMBERS, I GUESS IT'S A VALUE TO THEM PERSONALLY. AND JUST AS  
18 SIDELIGHT, ALTHOUGH PERHAPS NOT ONE THAT'S MEANT TO BE  
19 CONSIDERED, IT IS A VALUE TO THE CHARITABLE CAUSES THAT THESE  
20 RACES ARE FURTHERING.

21 NOW, MAYBE WE ARE NOT SUPPOSED TO COUNT THAT, I, AT LEAST,  
22 NOTE IT AS A GOOD THING, EVEN IF A SIDE EFFECT.

23 THERE WAS MENTION OF THE ALLOCATION ISSUES, AND THE FACT  
24 THAT EVERYBODY GETS 30 BUCKS WHETHER THEY BOUGHT ONE BAR OR A  
25 HUNDRED BARS. AND THAT'S A CHOICE THAT WAS MADE. COULD HAVE

1 BEEN MADE DIFFERENTLY, BUT I WOULD NOTE THAT -- AND I THINK  
2 THIS MAY HAVE COME UP AT THE FIRST ATTEMPT AT SETTLEMENT, THAT  
3 TO TRY TO VALUE IT BASED ON THE NUMBER OF PRODUCT BOUGHT, IF  
4 ONE WERE TO THEN TIE THAT TO RECEIPTS. YOU KNOW, THIS JUST  
5 ISN'T THE KIND OF CASE WHERE PEOPLE DON'T KEEP RECEIPTS OF  
6 THEIR CANDY BARS. IT'S JUST -- IT WOULDN'T HAVE WORKED THAT  
7 WAY. WE WOULD HAVE HAD I'M SURE FAR LESS CLAIMS IF PEOPLE HAD  
8 TO COME UP WITH THEIR RECEIPT FOR THEIR CANDY BAR THAT THEY  
9 BOUGHT FOUR YEARS AGO. IT WASN'T GOING TO HAPPEN.

10 AND IF THERE WEREN'T TO BE RECEIPTS, THEN IT DID RAISE  
11 SOME ISSUES OF, I DON'T WANT TO SAY FRAUD, BUT ISSUES OF  
12 OVERREACHING WHERE PEOPLE, IF THEY DON'T HAVE TO HAVE A  
13 RECEIPT, CAN SAY HOWEVER MANY BOTTLES THEY WANT TO SAY, AND IT  
14 SORT OF PLACES A PREMIUM ON THOSE WHO ARE WILLING TO  
15 EXAGGERATE VERSUS THOSE WHO ARE SCRUPULOUSLY HONEST. SO  
16 THERE'S CERTAINLY AN ARGUMENT TO BE MADE FOR SIMPLY MAKING IT  
17 A LUMP SUM RATHER THAN BASED ON WHAT YOU ARE WILLING TO SAY  
18 YOU DID.

19 SO, I DON'T REALLY HAVE A PROBLEM WITH THE ALLOCATION.

20 I DO HAVE SOMEWHAT OF A PROBLEM WITH THE ATTORNEYS' FEES.  
21 AND THE WAY I THINK THAT I WILL DEAL WITH THAT IS TO SIMPLY  
22 AWARD WHAT YOU HAVE CLAIMED AS THE LODESTAR.

23 AND I RECOGNIZE YOU WILL PROBABLY SPEND MORE THAN THAT  
24 BECAUSE YOU WILL HAVE FUTURE FEES AND I'M NOT GOING TO  
25 CONTINUE TO PAY IT, BUT I'LL PAY THE \$855,157.25, THE LODESTAR

1 AMOUNT PLUS THE COST AMOUNT, THE HUNDRED AND NINETY, WHATEVER  
2 IT WAS, AMOUNT.

3 AND I DO THAT NOT ONLY BECAUSE IT'S THE LODESTAR, I THINK  
4 THAT'S AN ADEQUATE REASON, BUT ALSO CROSS-CHECKING WITH THE  
5 PERCENTAGE, AND VALUING IT, EVEN IF I DON'T VALUE IT AT  
6 \$5 MILLION, AS YOU DID, WHICH WOULD -- WHICH WOULD MAKE IT, I  
7 DON'T KNOW, SOMETHING LESS THAN 19 PERCENT, AND EVEN IF I  
8 DON'T VALUE IT AT \$4 MILLION WITHOUT THE INJUNCTION AT ALL,  
9 WHICH WOULD HAVE MADE IT MORE LIKE 24 PERCENT AT THE FULL  
10 REQUEST, EVEN IF I CUT THE VALUE OF THE PRODUCT DISTRIBUTION  
11 AND LEAVE OUT THE VALUE OF THE INJUNCTION, THE THING YOU WERE  
12 ASKING FOR WAS 33 PERCENT, SO THIS IS LESS THAN THAT.

13 AND IT'S A BIT HOLISTIC, BUT GIVEN THE RELATIONSHIP OF THE  
14 LODESTAR TO THE PERCENTAGE TO THE ROUGH APPROXIMATION OF THE  
15 ACTUAL CASH PLUS THE SOMEWHAT SUBJECTIVE OR INTRINSIC VALUE OF  
16 THE NONCASH PORTIONS, AND JUST PUTTING ALL THOSE TOGETHER, AND  
17 WEIGHING IN THE DIFFICULTY OF THE CASE, I DO THINK THAT IT'S A  
18 SETTLEMENT THAT SHOULD BE APPROVED.

19 SO, THAT'S MY INCLINATION. IF ANYBODY HAS ANY LAST MINUTE  
20 OBJECTIONS TO WHAT I'VE SAID OR LAST MINUTE CORRECTIONS, I  
21 WILL LISTEN TO IT, BUT THAT'S MY INCLINATION.

22 **MR. CHAMBERLAIN:** I HAVE A BRIEF COMMENT, YOUR HONOR.

23 **THE COURT:** OKAY.

24 **MR. CHAMBERLAIN:** SO, I GUESS THE MOST IMPORTANT  
25 THING TO CONSIDER, LIKE -- I -- I DON'T KNOW HOW TO PUT THIS,

1 BUT THE NINTH CIRCUIT IN APPLE MAGSAFE REALLY IS INCLINED --  
2 YOU KNOW, WANTS TO MAKE SURE THAT, UM, THE INDICIA OF  
3 SELF-DEALING ARE DEALT WITH. AND I THINK THAT -- I THINK  
4 THAT -- I JUST REALLY THINK THAT THERE -- SINCE ALL THREE ARE  
5 HERE, SINCE THERE IS THAT KICKER, I JUST REALLY DO THINK IT'S  
6 SUBSTANTIVELY UNFAIR TO THE CLASS.

7 AND THE FACT THAT SOME CLASS MEMBERS WILL BENEFIT, I  
8 REALLY DON'T THINK THAT'S GOOD ENOUGH, AND I THINK THAT THE  
9 DENNIS AND BLUETOOTH REALLY DO PRECLUDE THAT.

10 **THE COURT:** I WOULD BE GIVING THEM -- I WOULD BE  
11 COMING TO MORE OR LESS THE SAME CONCLUSION, FRANKLY, EVEN IF  
12 THERE WASN'T A PRODUCT DISTRIBUTION, TO TELL YOU THE TRUTH.

13 **MR. CHAMBERLAIN:** OKAY.

14 **THE COURT:** SO THAT ISN'T A BIG PART OF IT. IT'S  
15 BETTER TO HAVE IT THAN NOT HAVE IT, AND I VALUE IT SOMEWHAT  
16 SIMILARLY EVEN IF THEY DIDN'T HAVE IT, SO I JUST AS SOON HAVE  
17 IT THAN NOT HAVE IT.

18 **MR. CHAMBERLAIN:** OKAY.

19 **THE COURT:** ANYTHING ELSE FROM YOU ALL?

20 **MR. PIFKO:** I HAVE NO FURTHER COMMENTS. THE MAGSAFE  
21 CASE DOES SAY, THOUGH, HOWEVER, DESPITE -- THE COURT CAN  
22 CONSIDER THOSE ISSUES, AND THEN DECIDE I'VE THOUGHT ABOUT THEM  
23 AND THEY ARE NOT AN ISSUE.

24 **THE COURT:** OH, I HAVE THOUGHT ABOUT IT. I HAVE  
25 THOUGHT ABOUT THEM.

1 ANYTHING ELSE FROM YOU?

2 **MR. NIERLICH:** YOUR HONOR, I HAVE NOTHING FURTHER,  
3 BUT ONE PROCEDURAL QUESTION.

4 DO YOU WANT THE -- EITHER OF THE PARTIES TO SUBMIT A  
5 REVISED PROPOSED ORDER TO TAKE INTO ACCOUNT WHAT HAS BEEN  
6 DISCUSSED HERE OR IS THE COURT GOING TO ISSUE AN ORDER AND  
7 SHOULD WE WAIT? WHAT'S YOUR PREFERENCE?

8 **THE COURT:** IT WOULD BE HANDY IF YOU COULD DRAFT A  
9 PROPOSED ORDER. I CAN'T USE THE ONE THAT YOU'VE GIVEN ME  
10 ALREADY BECAUSE I'M NOT DOING EXACTLY THE SAME THING.

11 IF YOU THINK YOU CAN WRITE UP WHAT I JUST SAID AND INCLUDE  
12 THE OTHER THINGS YOU THINK OUGHT TO BE THERE, I WOULD BE HAPPY  
13 TO TAKE A LOOK AT WHAT YOU COULD COME UP WITH, AND THAT WOULD  
14 SAVE ME SOME TROUBLE.

15 **MR. PIFKO:** WE WOULD BE HAPPY TO SAVE YOU SOME  
16 TROUBLE, YOUR HONOR.

17 **THE COURT:** ALL RIGHT. OKAY.

18 **MR. NIERLICH:** THANK YOU, YOUR HONOR.

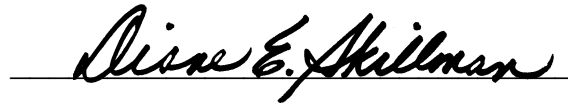
19 **MR. PIFKO:** THANK YOU.

20 **THE COURT:** THANK YOU.

21 (PROCEEDINGS CONCLUDED AT 3:07 P.M.)  
22  
23  
24  
25

**CERTIFICATE OF REPORTER**

I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE  
UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY  
CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE  
RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

FRIDAY, MAY 23, 2014